18-279

TRANSCRIPT OF RECORD.

564

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 245.

CAROLINE CARSON, PLAINTIEF IN ERROR,

vs.

MARY E. HYATT, WIDOW AND HEIR-AT-LAW OF EDMUND HYATT, DECEASED; MARY A. HYATT, EXECUTRIX AND HEIR-AT-LAW OF EDMUND HYATT, DECEASED; AND JOAQUIN DELMONTE, EXECUTOR OF EDMUND HYATT, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED JULY 23, 1883.

amicus 21825

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IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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1 No. 1.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of South Carolina, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of South Carolina before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mary E. Hyatt, widow and heir-at-law of Edmund Hyatt, deceased; Mary A. Hyatt, as executrix and devisee and heir-at-law of Edmund Hyatt, deceased; Joaquin Delmonte, executor of the said Edmund Hyatt, deceased; and Julia Delmonte, as devisee and heir-at-law of the said Edmund Hyatt, deceased, as complainants, and William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney and Company, and Caroline Carson, as defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
2 statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Caroline Carson, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 20th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
M. R. WAITE,
1—245 *Chief Justice U. S.*

3 [Endorsed.] The United States of America. Supreme Court. The State of South Carolina. In supreme court. Mary A. Hyatt, exe'x, *et al. vs.* William McBurney & others. Writ of error. Supreme court of South Carolina. Clerk's office, Columbia, S. C. Filed Nov. 24, 1882. Albert M. Boozer, clerk.

4 No. 2.

Nov. 20TH, 1882.

To Wm. McBurney, Wm. Haseltine, Alfred L. Gillespie, & Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co.:

You are hereby notified that Caroline Carson intends to prosecute a writ of error *from* the Supreme Court of the United States *to* the supreme court of the State of South Carolina to review the decree of the latter court, made on the 28th day of October, 1882, in the case of Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, and Julia Delmonte against you and the said Caroline Carson.

You will please inform us by notifying A. G. Magrath, at his office, No. 74 Broad street, Charleston, S. C., if you, or any one of you, will join in the said writ of error. If you do not signify your intention to do so the said Caroline Carson will sue out the same alone.

JAMES LOWNDES,
With him A. G. MAGRATH AND
H. E. YOUNG,
Att'y's for Caroline Carson.

5 No. 3.

Copy.

The United States of America to Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, Julia Delmonte, William McBurney, William Hasseltine, Alfred L. Gillespie, Thomas R. McGahan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Caroline Carson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

M. R. WAITE,
Chief Justice U. S.

6 No. 4.

Benjamin Huger Rutledge. Henry Edward Young.

LAW OFFICE OF RUTLEDGE & YOUNG,
26 BROAD STREET, CHARLESTON, S. C., *Nov. 20th*, 1882.

To Wm. McBurney, Wm. Haseltine, Alfred L. Gillespie, & Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co.:

You are hereby notified that Caroline Carson intends to prosecute a writ of error *from* the Supreme Court of the United States *to* the supreme court of the State of South Carolina to review the decree of the latter court, made on the 28th day of October, 1882, in the case of Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, and Julia Delmonte against you and the said Caroline Carson.

You will please inform us by notifying A. G. Magrath, Esq., at his office, No. 74 Broad St., Charleston, S. C., if you, or any one of you, will join in the said writ of error. If you do not signify your intention to do so the said Caroline Carson will sue out the same alone.

JAMES LOWNDES,
With him A. G. MAGRATH AND
H. E. YOUNG,
Att'ys for Caroline Carson.

7 STATE OF SOUTH CAROLINA, *Charleston County:*

Personally appeared before me R. G. O'Neale, who, being duly sworn, says: That on the twentieth day of November, 1882, he served Thomas R. McGahan and Wm. McBurney with copies of the within notice by leaving a copy of the same with each of them, and that he knows the persons so served to be Thomas R. McGahan and Wm. McBurney; that he did not serve Wm. Haseltine and Alfred L. Gillespie, because, after due and diligent search, he could not find them, and that he is informed that they reside beyond the limits of the State, to wit, Wm. Haseltine in Texas, and Alfred L. Gillespie in Tennessee, though where in such is unknown to him.

R. G. O'NEALE.

Sworn to before me this 20th day [of] Nov., 1882.

[Seal Jennings W. Perry, Notary Public, Charleston, S. C.]

JENNINGS W. PERRY,
Not. Pub.

8 [Endorsed:] Summons. Writ in error. Hyatt, exe'x, *vs.* McBurney *et al.* Summons. Caroline Carson. Supreme court of South Carolina. Clerk's office, Columbia, S. C. Filed Dec. 12, 1882. Albert M. Boozer, clerk.

9 The United States of America to Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, Julia Delmonte, William McBurney, William Hasseltine, Alfred L. Gillespie, Thomas R. McGahan, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Caroline Carson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the decision rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of November, in the year of our Lord one thousand eight hundred and eight-two.

M. R. WAITE,
Chief Justice U. S.

10 On the second day of December, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared R. G. O'Neele before me, the subscriber, T. Moultrie Mordecai, a notary public for So. Ca., and makes oath that he delivered a true copy of the within citation to Thomas R. McGahan & Wm. McBurney, and that he has not served William Hasseltine & Alfred L. Gillespie, because he has been unable to find them, and he is informed that they are without the limits of the State, their whereabouts being unknown.

R. G. O'NEELE.

Sworn to and subscribed the 4th December, A. D. 1882.

[Seal T. Moultrie Mordecai, Notary Public for Charleston, S. C]

T. MOULTRIE MORDECAI,
Notary Public S. C.

[Endorsed:] Original citation. Writ in error. Hyatt, exe'x, *vs.* McBurney *et al.* Citation. Supreme court of South Crolina. Clerk's office, Columbia, S. C. Filed Dec. 12, 1882. Albert M. Boozer, clerk. Original.

I accept service 27th day Nov., 1882, of the within citation for Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, Julia Delmonte.

EDWARD McCRADY, JUN'R.

11 No. 5.

The Answer of the Justices of the Supreme Court of South Carolina to the Foregoing Writ.

The record and process, whereof mention is therein made, follow in these words, to wit:

12 No. 6.

Complaint for Foreclosure.

STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas.

MARY A. HYATT, as Executrix and as Devisee and Heir-at-Law of the late Edmund Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt, deceased; Mary E. Hyatt, Widow and Heir-at-law of the said Edmund Hyatt, deceased; and Julia Delmonte, as Devisee and Heir-at-law of the said Edmund Hyatt, deceased,

vs.

WILLIAM MCBURNEY, WILLIAM HASSELTINE, ALBERT L. GILLESPIE, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson.

The complaint of the above-named plaintiff respectfully shows to this court:

I. That the late Edmund Hyatt, a citizen of the State of New York, together with William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, on the first day of December, A. D. 1862, and for a long time prior thereto, were copartners, trading and doing business together under the name and style of Hyatt, McBurney & Co., in the city of Charleston and State aforesaid.

13 II. That the said firm of Hyatt, McBurney & Co., on or about the said first day of December, A. D. 1862, purchased a certain plantation hereinafter described from Elias N. Ball, a citizen and resident of the State of South Carolina, at the price of one hundred thousand dollars, and on the —— day of May, A. D. 1863, the said Elias N. Ball conveyed the same to the said William McBurney and Alfred S. Gillespie, by the following description: "All that plantation or tract of land known as Dean Hall, situate on Cooper river, in St. John's parish, Berkley, in the district of Charleston and State aforesaid, butting and bounding to the east on Cooper river, to the northwest on lands formerly of William Colleton, but now or late John Harleston and Dr. William Moultrie, to the west on White Hall plantation, hereinafter described, to the south on lands formerly of J. E. Holmes, now of Peter Gourdin, and having such form, dimensions, and descriptive marks as are represented on a plat thereof made by Henry Ravenel, surveyor, in March, 1827, and containing twenty-six hundred acres, be the same more or less. Also all the tract of land situate in the same parish, known as White Hall, bounding east on Dean Hall, northeast on lands of John Harleston and Dr. William Moultrie, northwest on land formerly of H. S. Ball, deceased, now of James Poyas, and southwest on land formerly of John C. Ball, and afterwards of William Ball, deceased, and having such form, dimensions, and descriptive marks as are represented on a plat made by R. Q. Pinckney, surveyor, in April, 1837, and containing five hundred and twenty-six acres and twenty-three hundredths of an acre, more or less. Also all that parcel of land in the same parish, containing thirty-five acres and twenty-

one hundredths of an acre, bounding north and east on Chicken Creek, and south and west on Midway or Back river, as the same was granted to W. A. Carson by the State aforesaid, on the fourth day of September, A. D. 1843, "with *habendum* unto the said William McBurney and Alfred L. Gillespie, and the survivor of them, but to and for such uses, intents, and purposes as they, the said William McBurney and Alfred L. Gillespie, or the survivor of them, should, by any deed in writing, signed by them or him, in
14 the presence of two witnesses, from time to time limit, direct, or appoint, and until such limitation, direction, or appointment to the only proper use and behoof of the said Edmund Hyatt, William Hasseltine, Thomas R. McGahan, and the said William McBurney and Alfred L. Gillespie, their respective heirs and assigns, in such shares, interests, and proportions as they then were entitled to in the capital and profits of the then copartnership of Hyatt, McBurney & Co., which deed was duly recorded in the office of register of mesne conveyance for Charleston county, then district, in book G, No. 14, p. 157.

III. That the said copartnership being about to expire on the 31st day of May, A. D. 1863, the said Edmund Hyatt sold his interest in the copartnership property and assets to Willian McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, the other copartners, bearing date the 8th day of May, A. D. 1863, released his interest in the said plantation so that the said interest should enure to the only proper use and behoof of the said William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, their respective heirs and assigns, in such proportions as they lately had as copartners in the capital and profits of the late copartnership of Hyatt, McBurney & Co., which deed was duly recorded in the office of register of mesne conveyance for Charleston county, then district, in book S, No. 14, p. 402.

IV. That to secure a bond of the said William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan to the said Edmund Hyatt, conditioned for the payment of forty thousand dollars given for the purchase of his interest in the said firm of Hyatt, McBurny & Co., the said William McBurney and Alfred L. Gillespie, by their deed signed in the presence of two witnesses, bearing date the said 8th day of May, A. D. 1863, declared, limited, and appointed the said plantation to the use of the said Edmund Hyatt, his heirs and assigns, as a mortgage to secure the said bond, which said mortgage was duly recorded in the office of register of mesne conveyance aforesaid, in book S, No. 14, p. 399, as will more fully appear upon reference to the said deed.

15 V. That the said Edmund Hyatt departed this life on or about the twentieth day of September, in the year of our Lord eighteen hundred and seventy-six, leaving of full force and unrevoked his last will and testament, whereby he appointed his daughter, Mary A. Hyatt, executrix, and his son-in-law, Joaquin Delmonte, executor; that the said Mary A. Hyatt and Julia Delmonte are devisees under the will, and heirs-at-law of the said Ed-

mund Hyatt, and that the said Mary E. Hyatt is the widow and heir-at-law of the said Edmund Hyatt.

VI. That the condition of the said bond and mortgage has been broken, and that there is due to these plaintiffs and remaining unpaid on the said bond and mortgage a large amount.

VII. That the said plantation above described, and which was conveyed to the said William McBurney and Alfred L. Gillespie, and by them mortgaged to the said Edmund Hyatt, as above mentioned, was formerly the property of the late William A. Carson, who by his will, after certain specific bequests, devised the residue of his estate, in which was included the said plantation, to his executors, or to such one of them as should qualify, with directions to sell the same upon such terms as he or they might deem most judicious, and to apply the proceeds of sale upon certain trusts for the benefit of his wife, Caroline Carson, and of his sons, William Carson and James P. Carson. That in pursuance of the said power and direction in the said will, Alexander Robertson and John F. Blacklock, executors of the said William A. Carson, sold and conveyed the said plantation to the said Elias N. Ball, who mortgaged the same to the said executors to secure the credit part of the purchase-money thereof, which said bond and mortgage these plaintiffs are informed and believe was paid and satisfied, and do so charge.

VIII. That these plaintiffs are informed that, subsequently to the said mortgage by the said William McBurney and Alfred L. Gillespie to the said Edmund Hyatt, *that* the said Caroline Carson, claiming in her own right, and as assignee of her sons' interest under their father's will, instituted proceedings in the United States circuit court for South Carolina against William McBurney and Alfred L. Gillespie
16 and the other copartners of the firm of Hyatt, McBurney & Co., excepting the said Edmund Hyatt, to set up and foreclose the mortgage given by the said Elias N. Ball to the said executors of William A. Carson, and that in such proceedings she has obtained a decree in her favor as well as assignee of her sons' interest as in her own right under the said will, but that as neither the said Edmund Hyatt nor these plaintiffs, nor any other person representing the said Edmund Hyatt since his death, were parties to the said proceedings these plaintiffs are not bound thereby.

Wherefore the plaintiffs pray that an account may be had as to the amount due upon the bond from the said William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan to the said Edmund Hyatt, and that the said mortgage may be foreclosed and the equity redemption barred, and the premises ordered to be sold, freed, and discharged from any lien or incumbrance whatsoever of the said Caroline Carson, and the proceeds applied to to the payment of the said debt, and execution awarded for any balance which may remain due against the said William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan, and that an account of the rents and profits of the said premises known as Dean Hall may be had of the defendants, or such of them as may now be in possession, or such as may hereafter come into possession, their agents and tenants, or any person or persons

claiming by, through, or under any of them from the filing of this complaint, and that a receiver may be appointed to take possession of the said premises and to receive the rents and profits arising from the same.

McCRADY & SON,
Plaintiffs' Attorneys.

17 STATE OF SOUTH CAROLINA, *Charleston County:*

Personally appeared before me Edward McCrady, the younger, one of the members of the firm of McCrady & Son, plaintiffs' attorneys, who, being duly sworn, says: That the foregoing complaint is true of his own knowledge; that he makes this verification because the plaintiffs are residents of the State of New York and absent from this State; that the action is founded upon a mortgage, which is now sought to be foreclosed; which mortgage is in the possession of this deponent's firm, and that all the material allegations contained in the complaint are within his personal knowledge.

EDWARD McCRADY, JUN'R.

Sworn to before me this 15th day of October, A. D. 1879.

JOHN H. OSTENDORFF,
C. C. P. & G. S.

A true copy.

JOHN H. OSTENDORFF,
C. C. P. & G. S.

No. 7.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al.*, Plaintiffs,
vs.
WILLIAM McBURNIE *et al.*, Defendants.

The defendant, Caroline Carson, for answer to the complaint of the plaintiffs herein, says:

Her husband, William A. Carson, of the parish of St. John's,
18 Berkley, of Charleston county, in the State of South Carolina, did, by his last will and testament, bearing date the 11th day of March, A. D. 1854, after making certain specific bequests, direct his executors, or such one as might qualify, to sell the residue of his estate; out of the proceeds of sale to pay his debts, to divide the balance of such proceeds into three equal parts, to hold one such third part in trust for his wife, Caroline Carson, the defendant, during her life, and to hold in trust the other two third parts for his sons, William Carson and James Petigru Carson, to be paid to them absolutely on their attaining the age of twenty-one years. The rest and residue of his estate, including the remainder in the one-third part, to be held in trust for his wife, be bequeathed to his two said sons to invest absolutely, on their attaining the age of twenty-one years.

He appointed Alexander Robertson and John Freer Blacklock executors of his will and testament, and guardians of his sons. Refer-

ence is craved to the copy of the said will hereto annexed, which is to be taken as a part of this answer.

2. William A. Carson died on the 17th August, 1856, and Alexander Robertson and John Freer Blacklock proved his will in the court of ordinary of Charleston county, and there qualified as executors, and proceeded to sell the testator's estate and execute his will. One part of his estate sold by them was a valuable rice plantation, not far from the city of Charleston, known as Dean Hall, which they sold to Elias N. Ball for $50,000.

For the unpaid portion of the purchase-money Elias N. Ball, on the 2d of March, 1857, executed to the said executors three bonds, each in the penal sum of $18,000, and two, each in the penal sum of $8,000, conditioned, the three first named, each for the payment of $9,000, and the two last named, each for the payment of $4,000, in five equal successive annual instalments, from the 14th January, 1857, with interest from this date, payable annually. To secure these bonds Elias N. Ball, on the 2d March, 1857, executed to the said executors a conveyance, by way of mortgage of Dean Hall, which mortgage was, on the 11th March, 1857, duly recorded in the mesne conveyance office, of Charleston county.

19 3. On or before the 4th June, 1857, the said executors had sold the whole of the testator's estate, and paid his debts, and they thereupon made distribution of the testator's estate; and, in their character of executors, transferred to themselves, as trustees under the said will, the above-mentioned bonds and mortgage, viz., to themselves, as trustees of the defendants, one bond of $9,000 and one-third interest in one bond of $4,000, and to themselves, as trustees of her two sons, for each the same amount in bonds, making an aggregate of $31,000 in bonds. They then took and held, as trustees, the mortgage of Dean Hall, securing the said debt of $31,000.

4. The defendant who, during the late war, adhered to the cause of the Union, early in 1861 left South Carolina and went to New York, where she has ever since resided and had her domicile. She believes that her absence from South Carolina was matter of notoriety, and was known to McBurney and his copartners. Her son, William Carson, who came of age after 1863, left South Carolina and the Confederate States before the war, and has been absent ever since. Her son, James P. Carson, came of age after the late war. John Freer Blacklock was absent from the United States during the whole of the late war.

5. In March, 1863, the firm of Hyatt, McBurney and Company, of Charleston, South Carolina, the copartners of which were the complainant's testator, Edmund Hyatt, William McBurney, William Hasseltine, Thomas R. McGahan, and Alfred L. Gillespie, entered into negotiations with the said Elias N. Ball for the purchase of Dean Hall.

Finding the legal title encumbered with the said mortgage to the trustees of this defendant and her infant sons, the said Hyatt, McBurney and Company furnished to the said Ball their Confederate treasury notes of the nominal amount of the debt, secured by the said mortgage of Dean Hall, and proceeded and requested the said

Ball to obtain therewith a surrender of the bonds and mortgage by Alexander Robertson, the only trustee then in America. The said Ball, at the instance and request of Hyatt, McBurney and Company, thereupon induced the said Robertson, in breach of his trust, to surrender the said bonds and mortgage in consideration of
20 the delivery to him of the said Confederate treasury notes. Thereupon, on the 23d of April, 1863, Ball conveyed Dean Hall to McBurney and Gillespie, in trust for or to the use of the copartners, Hyatt, McBurney and Company, in proportion to their interest in the partnership.

6. On the 8th of May, 1863, Edmund Hyatt, as this defendant is informed and believes, came to a settlement with his copartners, and took in such settlement of his interest in the firm of Hyatt, McBurney and Company the bond and mortgage which the plaintiffs are seeking to enforce in this suit. The defendant is informed and believes that no new consideration moved between Hyatt and his partners for the said mortgage. The said Hyatt acquired thereto no higher interest in Dean Hall than he had under the said deed or than he had by his partnership equity in Dean Hall.

7. The said mortgage held by Robertson was not satisfied until the 21st of July, A. D. 1866, when Robertson, alone at the instance, as this defendant believes, of McBurney, executed a satisfaction of it.

8. The defendant was in New York at the time of the said transactions and knew nothing of them, and as soon as she heard of them repudiated them. Her sons were then both under age, and on coming of age repudiated them. The trustee, John Freer Blacklock, was at the time in Europe, and has repudiated them and refused to join in the satisfaction. In July, 1866, her sons assigned to the defendant all of their interest in the said bonds and mortgage.

9. At the time of the surrender of the said bonds to Hyatt, McBurney and Company by Robertson they could have been exchanged in the market for more than double the amount in Confederate treasury notes of their face value.

10. Hyatt, McBurney and Company had at the time of the said transactions full notice of the rights in "Dean Hall" of this defendant and her sons. McBurney, one of the copartners, had knowledge in fact of the said rights and procured the said breach of trust to be committed by Robertson. The defendant is informed and believes that Hyatt had full notice in fact of the said rights and aided the said McBurney in procuring the said breach of trust to be
21 committed; that he knew of the absence of the defendant and John Freer Blacklock.

11. On the 11th of August, 1866, this defendant impleaded in the circuit court of the United States for the district of South Carolina all of the copartners of Hyatt, McBurney & Co., except the said Hyatt, who could not be made a party by reason of his citizenship in respect of the matters hereinbefore set forth and prayed, that the said bonds surrendered by Robertson be declared valid and subsisting securities, and that the mortgage securing them be declared a valid and subsisting lien on "Dean Hall," and praying a foreclosure thereof, and it was so duly decreed by the said court on the 10th of

May, A. D. 1878, which said decree was affirmed by the supreme court at its October term, 1878. In pursuance of the said decree "Dean Hall" was sold to this defendant by the marshal of the district of South Carolina at public outcry, on the 26th November, 1879, for the sum of —— dollars, and duly conveyed to this defendant. She prays that the record (see appendix) of the said suit may be taken as a part of this answer, and she says that the said decree adjudged her rights in the premises as against all the partners of Hyatt, McBurney & Company, and is a bar to this action.

12. The plaintiffs, as this defendant is informed and believes, well knew of the said sale of Dean Hall, and stood by and gave no notice to the defendant of their intention to set up the said mortgage.

13. She says that in any event the plaintiffs are estopped by the said decree from denying the validity of the said bonds and mortgage held by Robertson as trustee, as aforesaid, or their priority to that of the plaintiffs, and she says that they cannot enforce their said mortgage without first redeeming that of the defendant.

14. The plaintiff's testator by his last will and testament appointed Abraham V. W. Van Vechten as executor of his last will and testament, and the said Van Vechten is a necessary party to this action. If the said Van Vechten be dead David F. Lee is a necessary party thereto; and the said Mary E. Hyatt is improperly joined as a party to this action.

22 Whereupon this defendant prays that the said complaint be dismissed, and that she be adjudged her costs and expenses.

JAMES LOWNDES,
A. G. MAGRATH,
Defendants' Attorneys.

No. 8.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas.

MARY A. HYATT, as Executrix and as Devisee and Heir-at-law of the late Edward Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt; Mary E. Hyatt, Widow and Heir-at-law of the said Edmund Hyatt, deceased, and Julia Delmonte, as Devisee and Heir-at-law of the said Edmund Hyatt,

vs.

WILLIAM MCBURNEY, WILLIAM HASSELTINE, ALFRED L. GILLESPIE, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson.

The time for the defendants in this case to answer having expired, on motion of McCrady & Son, plaintiffs' attorneys, it is ordered that the case be referred to W. D. Clancy, Esq., one of the masters of this court, to take testimony and report the same; and, with the consent of the said plaintiffs' attorneys, it is further ordered that the defendant, Caroline Carson, do have further time to answer the complaint herein, to wit, until the twenty-fourth day of January next,

and that she be allowed to file the same, under the signature of her counsel, who has entered an appearance in the cause without oath thereto.

December 16, 1879.

A. P. ALDRICH.

We consent.

McCRADY & SON.
A. G. MAGRATH.

A true copy.

JNO. H. OSTENDORFF,
C. C. P. & G. S.

23 No. 9.

THE STATE OF SOUTH CAROLINA, *County of Charleston:*

In the Court of Common Pleas.

Ex parte CAROLINE CARSON *in re* MARY A. HYATT, as Executrix and as Devisee and Heir-at-law of the late Edmund Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt, Deceased; Mary E. Hyatt, Widow and Heir-at-law of the said Edmund Hyatt, Deceased, and Julia Delmonte, as Devisee and Heir-at-law of the said Edmund Hyatt, Deceased,

vs.

WILLIAM McBURNEY, WILLIAM HASSELTINE, ALFRED L. GILLESPIE, and Thomas R. McGahan, Members of the late firm of Hyatt, McBurney & Co., and Caroline Carson.

To the honorable the judges of the said court:

Your petitioner, Caroline Carson, respectfully sheweth that the above-entitled suit is of a civil nature, and is now pending in this court; the matter or amount in dispute is, exclusive of costs, the sum or value of five hundred dollars, and is of the value of over ten thousand dollars; that the controversy in the said suit is between citizens of different States, and between citizens of a State and a citizen or subject of a foreign State; that your petitioner was at the beginning of this suit, and still is, a citizen of the State of Massachusetts; that the said Joaquin Delmonte then was, and still is, a citizen or subject of Spain, and all the other parties, plaintiffs above mentioned, then were, and still are, citizens of the State of New York; that William McBurney and Thomas R. McGahan
24 then were, and still are, citizens of South Carolina; that Alfred L. Gillespie then was, and still is, a citizen of Tennessee; and William Hasseltine then was, and still is, a citizen of California.

Your petitioner further says that in the above-mentioned suit there is a controversy which is wholly between citizens of different States and between a citizen of a State and a foreign State, namely, between the said plaintiffs and your petitioner, and which can be wholly determined as between them.

And your petitioner offers herewith a bond, with good and sufficient surety, for her entering in said circuit court of the United

States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if the said court shall hold that this suit was wrongfully or improperly removed thereto.

And she prays this honorable court to proceed no further therein, except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the district of South Carolina; and she will ever pray, &c.

JAMES LOWNDES,
Attorney for Petitioner.

Filed February 16, 1880.

25 No. 10.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas.

MARY A. HYATT, Executrix, and Others *vs.* CAROLINE CARSON.

Personally appeared before me James Lowndes, and made oath that he is the attorney of Caroline Carson, and has read her petition for the removal of the said cause to the circuit court of the United States for the district of South Carolina, and that the facts therein stated are true to the best of his information and belief, save that he cannot aver that Dean Hall is of greater value than five thousand dollars and five hundred dollars; that his information as to the domicile of Hasseltine is drawn from a statement made to him by some person, whose name he cannot recall; that his information as to the domicile of Caroline Carson is drawn from these facts, viz: That about the 1st July, 1877, he received in due course of mail a letter from the said Caroline Carson, dated at Brookline, Massachusetts, in which she informed the deponent that she had made a declaration or affidavit of her change of domicile from New York to Massachusetts; and that deponent continued to receive letters from her in the latter State during the month of July, 1877, and he knows her purpose to have been to become a citizen of Massachusetts; and he knows that she has not in fact for many years resided in New York.

JAMES LOWNDES.

26 DISTRICT OF COLUMBIA, *County of Washington:*

Personally appeared James Lowndes, to me well known, and made oath to the foregoing paper this 14th day of February, A. D. 1880.

LEMUEL BURSLEY,
Notary Public.

Sworn to before me this 14th day of February, A. D. 1880, at Washington, D. C.

LEMUEL BURSLEY,
Notary Public.

Filed February 16, 1880.

No. 11.

Know all men by these presents that we, James Lowndes and Henry E. Young, are held and firmly bound unto Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, and Julia Delmonte in the penal sum of five hundred $\frac{00}{100}$ dollars; the payment whereof, well and truly to be made unto the said Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, and Julia Delmonte, their executors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas Caroline Carson has filed a petition in the court of common pleas of the county of Charleston, in the State of South Carolina, for the removal of a certain cause therein pending, wherein Mary A. Hyatt, Joaquin Delmonte, Mary E. Hyatt, and Julia Delmonte are plaintiffs and Caroline Carson, William McBurney, William Hasseltine, Alfred L. Gillespie, and Thomas R. McGahan are defendants, to the circuit court of the United States in and for the district of South Carolina:

Now, if the said Caroline Carson, your petitioner, shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force.

Witness our hands and seals this 16th day of February, A. D. 1880.

JAMES LOWNDES. [L. S.]
H. E. YOUNG. [L. S.]

As to the signature and seal of James Lowndes, in the presence of—

HORACE W. UPPERMAN.

As to the signature of H. E. Young—
JENNINGS W. PERRY.

Filed 16th July, 1880.

27 *Report of Master W. D. Clancy.*

THE STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas.

MARY A. HYATT, EX'X, *et al. vs* WM. MCBURNEY *et al.*

To the Honorable B. C. Pressley, judge of the first circuit:

This case was referred to me by an order of this honorable court, bearing date the 16th day of December, 1879, "to take testimony and report the same." I beg leave to respectfully report that I have been attended by the solicitors of the plaintiff, Messrs. McCrady & Son, and by the Hon. A. G. Magrath, representing the answering defendant, Caroline Carson.

The complaint and answer were duly read, and the plaintiff proceeded to prove her bond and mortgage, all of which will more fully appear by the testimony, a copy of which is filed herewith.

At the close of the plaintiff's case the Hon. A. G. Magrath, counsel for Mrs. Caroline Carson, notified the master that he had on that day, to wit, the 16th day of February, 1880, filed a petition in the clerk's office of the court of common pleas for Charleston county in behalf of Caroline Carson, the defendant, praying in her behalf the removal of this case into the United States court, and that it was his purpose not to proceed with this cause before the master. Mr. McCrady, Jr., then moved that the master file his report of the testimony taken in the cause, as directed by the order of reference.

I beg leave to file also with this report and testimony a transcript of record in the case of Wm. McBurney *et al. vs.* Caroline Carson in the Supreme Court of the United States, introduced in evidence by the plaintiffs.

All of which is respectfully submitted.

Charleston, S. C., 27th February, 1880.

W. D. CLANCY, *Master.*

MARY A. HYATT, *et al. vs.* WM. MCBURNEY, *et al.*

28 MASTER'S OFFICE, *February* 3*d*, 1880.

At a reference held this day—present, Edw'd McCrady, Jr., Esq. representing the plaintiffs; Hon. A. G. Magrath for the defendant, Mrs. Carson—Mr. McCrady read the complaint; Hon. A. G. Magrath the answer of Mrs. Carson.

Copy of the record in Carson *vs.* Robertson *et al.* filed as an exhibit to the answer of Caroline Carson.

Reference adjourned.

IDEM *vs.* IDEM.

MASTER'S OFFICE, *February* 6, 1880.

At a reference held this day—present, Mr. McCrady, Jr., Judge Magrath—Mr. McCrady put in evidence bond of Wm. McBurney *et al.* to Edmund Hyatt, dated 8th May, 1863, conditioned to pay $40,000, with interest, 22d April, 1868. Mr. McCrady admits a credit of $30,000 on said bond, with interest paid up to 1st January, 1879.

The following were admitted as in evidence by Judge Magrath, from the printed brief in Carson *vs.* Robertson *et al.*, to wit, the mortgage of Elias Ball to executors of Carson, "page 39."

Conveyance of Ball to McBurney and Gillespie, "page 83."

Release from Hyatt of his interest in said conveyance to McBurney *et al.*, "page 87."

Appointment in the nature of a mortgage, McBurney *et al.* to Hyatt, "page 87."

Mr. McCrady admits "will" of W. A. Carson, "page 29."

Account of the executors of Carson filed with judge of probate and admitted to be correct copy. (Certificate of judge of probate, 23d July, 1866, page 43 to 62, inclusive.)

29 JOHN S. RIGGS, a witness for the plaintiff, sworn by Mr. by Mr. MCCRADY:

Witness was a broker of real estate in the city of Charleston before and during the late war between the States; continued in this business up to the year 1866; was employed by parties to buy and sell real estate securities. On the 24th April, 1863, witness sold $500 worth of city of Charleston six per cent. stock for $1.32, 32 cents premium.

Same day sold city stock at $1.30, 30 cents premium; $500 Greenville and Columbia R. R. bonds at $1.50, 50 cents premium; Charleston and Savannah R. R. bonds—don't know if they were 1st or 2d mortgage—at $1.46, 46 cents premium; sold $1,700 city of Charleston 6 per cent. stock at $.132½, 32½ premium; $500 N. E. R. R. bonds—don't know if they were 1st or 2d mortgage—at $1.27½, 27½ premium; $670 city of Charleston 6 per cent. stock at $1.32, 32 premium. Payments were made in Confederate currency for all of the before mentioned sales.

After the war city of Charleston 6 per cent. stock varied from 50 to 70 cents and upwards on the $1.

Adjourned.

IDEM *vs.* IDEM.

MASTER'S OFFICE, *February* 10, 1880.

At a reference held this day—Mr. McCrady, A. G. Magarth—H. H. DELEON, a witness for the plaintiff, sworn, — Mr. MCCRADY:

Witness has been a stock and real estate broker in the city of Charleston for the last twenty years. May 22, 1863, witness sold North Eastern railroad 1st mortgage bonds at $1.30, 30 cents premium, payment made in Confederate currency. Such securities were on the market from time to time, city stock and other securities. All securities were at a premium in Confederate currency at that time; North Eastern R. R. bonds were regarded as a first-class security.

Plaintiff closes.

Reference adjourned.

SAME *vs.* SAME.

30 MASTER'S OFFICE, *February* 16, 1880.

At a reference held this day—present, Hon. A. G. Magrath, Edward McCrady, Sr., Esq., Edward McCrady, Jr., Esq.—Hon. A. G. Magrath, representing the defendant, Caroline Carson, stated that he had this day filed a petition in the clerk's office of the court of common pleas for Charleston county, praying among other things the removal of the cause into the United States court, and that he would not continue the references before the master.

Mr. McCrady, Jr., moved that the master file his report of the testimony taken in the cause, as directed by the order of reference.

Adjourned.

February 27, 1880. W. D. CLANCY, *Master.*

A true copy.

JOHN H. OSTENDORFF,
C. C. P. & G. S.

SOUTH CAROLINA:

In the name of God, amen. I, William A. Carson, of St. John's, Berkley parish, Charleston district, and State aforesaid, planter, being of sound and disposing mind and memory, do make and declare this to be my last will and testament, hereby cancelling and revoking all former wills and testaments by me heretofore made. It is my desire that I should be buried by the side of my mother in St. Michaels churchyard, Charleston.

Imprimis. I give and bequeath to my wife, Caroline Carson, the sum of two thousand dollars, to be paid her by my executors as soon after my decease as convenient; also the entire furniture of her bed-rooms in the country and city; also my piano, carriage, and pair of horses.

Item. I give and bequeath to my son, William Carson, my gold watch and negro boy, Van Buren. To my son, James P. Carson, my silver watch, made by Tobias, and my gun and my negro
31 boy, Neptune. And to my sons, William Carson and James P. Carson, jointly, all the rest of my guns, pistols, and swords, my stock of wines and liquors of every kind, my books, mathematical instruments, telescopes, microscopes, barometers, &c., and all my plate and silverware, spoons, forks, &c., and plated ware of every kind whatsoever. Also my writing-desks; also my dwelling-house and lot of land on Sullivan's Island, with all the furniture and chattels of every kind therein and on my said premises, together with all the boats of every kind, usually kept there by me for my use and convenience.

Item. I give and bequeath to my friend, John F. Blacklock, my slave Hector (carpenter).

Item. I give and bequeath to my sons, William Carson and James P. Carson, and the survivor of them, my slaves, Matilda, Blanche, and her child Meeta, and I enjoin it upon my said sons and the survivor of them that, in consideration of their fidelity and services to me, they be treated with special kindness and indulgence.

Item. I order and direct my executors, or such one as may qualify hereon, to sell all the rest of my estate, real and personal, as soon after my decease and upon such terms as they or he may deem most judicious. Until such sale takes place I order and direct my executors to apply so much of the income of my estate to the maintenance and support of my wife and children and the education of the latter as they or he in their discretion may deem fit and proper. From the balance of the income until the sale, and from the proceeds of sale, I order and direct my debts to be paid, and then the residue of the purchase-money to be divided into three equal parts,

and held by my executors, or my qualified executor, in trust for the following purposes, viz:

1. To pay the interest arising from one-third part thereof to my wife, Caroline Carson, for and during the term of her natural life, and the legacy and provision herein made for her shall be in lieu and bar of dower and every other claim she may set up on my estate.

2. To pay and apply the interest arising from another third part thereof to the maintenance, education, and support of my son,
32 William Carson, during his minority, if they deem so much necessary, and, upon his attaining the age of twenty-one years, the capital or principal thereof, and its accumulation, if any, to be paid over to him absolutely; and—

3. To pay and apply the interest arising from the remaining third part thereof to the maintenance, education, and support of my son, James P. Carson, during his minority, if they deem so much necessary, and, upon his attaining the age twenty-one years, the capital or principal thereof and its accumulations, if any, to be paid over to him absolutely.

Should either of my said sons depart this life before attaining the age of twenty-one years, I give and bequeath the share of the one so dying to his surviving brother absolutely. But should both die before that period, I give and bequeath both their said shares to my next of kin by consanguinity.

Item. I give, devise, and bequeath all the rest and residue of my estate, including the aforesaid third part after my wife's death, to my two sons, William Carson and James P. Carson, or the survivor of them, should either die under the age of twenty-one years, but should both my said sons depart this life before attaining that age, I then give, devise, and bequeath both their said shares to my next of kin by consanguinity.

Item. I authorize and empower my executors or qualified executor to vest and reinvest the purchase-money of my estate so as aforesaid to be held in trust by them in such public or private securities or stocks as they may deem best.

Lastly. I nominate, constitute, and appoint my friends, Alexander Robertson and John F. Blacklock, executors of this my last will and testament and testamentary guardian of my children.

Witness my hand and seal this eleventh day of March, in the year of our Lord one thousand eight hundred and fifty-four.

WM. A. CARSON. [L. S.]

Signed, sealed, published, and declared by the testator as his last will and testament in our presence, who, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names in testimony thereof.

H. A. DESAUSSURE.
WILLIAM BLANDING.
LOUIS D. DESAUSSURE.

Proved before George Buist, Esq., O. C. D., August 18th, 1856. November 5th, 1856, qualified Alexander Robertson and John F. Blacklock, executors therein named.

33 No. 13.

Order Refusing Motion to Remove Cause to United States Court.

STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al. vs.* CAROLINE CARSON.

The plaintiffs in this case, except one, a Spanish subject, are citizens of the State of New York, and the controversy, as appears by the pleadings, is wholly between them and the defendant, Caroline Carson, who, in her answer, states that she is also a citizen of that State. She has also filed with her answer an exhibit of a previous case in the United States court relating to the same matter, in which case she was plaintiff, suing as a citizen of the State of New York. No motion has been made by her for leave to amend or withdraw her answer, nor has any affidavit or other testimony been submitted shewing that her answer was erroneous and the matter therein in reference to her citizenship was inserted by inadvertence or mistake. After this case had been referred to the master, and after the filing of her said answer by the said defendant, and the master, attended by the attorneys for plaintiffs and said defendant, had finished taking the testimony offered by the plaintiffs, the said defendant filed a petition in this court praying a removal of this case to the circuit court of the United States, and alleging that she is a citizen of the State of Massachusetts.

That petition is not properly verified, and the insufficient affidavit by her attorney does not state any matter which would justify me in disregarding the positive statement in her answer and exhibit.

I, therefore, hold that the controversy in this case is between a citizen of the State of New York on the one side and other citizens of the same State and a Spanish subject on the other side; and, further, that the petition of defendant for the removal of the case was not filed until after the trial had commenced.

She is, therefore, not entitled to have the case removed from this court, and her motion to that effect is refused.

March 25, 1880.

B. C. PRESSLEY,
Presiding Judge.

Filed March 25, 1880.

34 No. 14.

MARY A. HYATT, Ex., and Others, Ex'ors of Edward Hyatt, *et al.*
vs.
WILLIAM MCBIRNIE and CAROLINE CARSON *et al.*

Counsel in this cause agree as follows:

1st. Defendants' counsel admits the mortgage, the will of Edward Hyatt, the qualification of executrix and executor on the will
35 in this State, and also the copy of the written submission of the parties in a former case of Carson *vs.* Robertson and others; also all the other conveyances printed in such record.

2d. Complainants' counsel agree to admit the conveyance of the

marshal of the U. S. to Caroline Carson under the decree of the U. S. Supreme Court, and also that the accounts printed in the record of the case already referred to are of record in the ordinary's office of this county, and which record is filed as exhibit to defendants' answer.

3rd. It is agreed that the parties on either side have the right to refer to the testimony taken and found in the said record filed as an exhibit by the defendant, Mrs. Caroline Carson, with her answer, which printed record is received as such exhibit filed with the said bill, subject to all just objections to such testimony.

No. 15.

STATE OF SOUTH CAROLINA, *Charleston County:*

Court of Common Pleas.

MARY A. HYATT, Executrix, *et al.*,
vs.
WM. MCBURNEY & CO. *et al.*

In this case plaintiffs seek to foreclose their mortgage on Dean Hall plantation, which secures a debt due them by McBurney & Co. Their codefendant, Mrs. Carson, held an older mortgage on said plantation, which one of the executors to whom the mortgage was given satisfied during the late war. That satisfaction was set aside as fraudulent and void by the Supreme Court of the United States in a case to which McBurney & Co. were parties, but plaintiffs here were not parties to that case. I find here not a shadow of fraud, either in the circumstances attending the said satisfaction or
36 in the nature of the payment, and the very high character of all parties to that transaction would rebut even strong proof of fraud, if such had been produced in the case. In the absence of all proof in that respect I follow the decisions of the supreme court of this State and hold that plaintiffs have a valid mortgage on said plantation, discharged of the said older mortgage.

But the obligors of the bond which plaintiffs' mortgage secures, being parties to the decision of the United States court, are bound by it. It is a final adjudication of their rights, and I am bound to respect. In doing so I must give it full effect, if that can be done without impairing the lien of the plaintiffs. They are not entitled to enforce payment of their bond out of property which the said decision gives to Mrs. Carson if they can without difficult or expensive litigation enforce payment by the obligors, who are bound by the said decision. Were I to decree that, my profession of respect for that decision would be only a flimsy pretense.

It is therefore ordered that this case be recommitted to Master Clancy to take testimony and report whether the plaintiffs can without difficult or expensive litigation procure payment from the obligors of said bond otherwise than by the foreclosure of their said mortgage.

The Code, as construed by the supreme court of this State, requires that every case, without regard to the pleadings, be decided

according to right. To that end leave must be granted to amend the pleadings, even after the hearing. If Mrs. Carson be advised that amendment of her answer be necessary, leave to amend it according to the claim set up by her at the hearing is hereby granted.

August 30, 1880.

B. C. PRESSLY,
Presiding Judge.

A true copy.

JOHN H. OSTENDORFF,
C. C. P. & G. S.

37 No. 16.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

Court of Common Pleas.

MARY A. HYATT, Executrix and Devisee and Heir-at-Law of the late Edmund Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt; Mary E. Hyatt, widow and Heir-at-Law of the said Edmund Hyatt, and Julia Delmonte, as Devisee and Heir-at-Law of the said Edmund Hyatt,

vs.

WILLIAM MCBURNEY, WILLIAM HASSELTINE, ALFRED L. GILLESPIE, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney & Co., and Caroline Carson.

To Hon. A. G. Magrath and James Lowndes, Esq., counsel for Mrs. Caroline Carson:

DEAR SIRS: You will please take notice that the plaintiffs herein appeal from the decree of his honor Judge B. C. Pressley in this cause, filed on the 3d instant, except as to that portion of the same which decides and decrees that there was no evidence of fraud in the transaction between Hyatt, McBurney & Co. and the executors of Carson, and that the mortgage from Ball to the executors of Carson was fully satisfied, according to the laws of this State.

McCRADY & SON,
Plaintiffs' Attorneys.

Charleston, Sept. 11, 1880.

Grounds of Appeal.

1. Because his honor erred in holding that the plaintiffs are not entitled to enforce payment of their bond out of the mortgaged property, if they can without difficulty enforce payment by the obligors.

38 2. Because no such defence was made in the pleadings, and could not, therefore, be set up on the hearing of the cause, upon the master's report, and that his honor clearly erred in sustaining such defence which did not appear in the pleadings.

3. Because such ruling in effect altered and changed the contract between the parties, and deprived the plaintiffs of the benefit and advantage of their security.

4. Because his honor erred in holding that the Code, as construed

by the supreme court of this State, requires that every case, without regard to the pleadings, be decided according to right, and that to that end pleadings may be amended even after hearing, and in granting leave to the defendant, Caroline Carson, to amend her pleadings in this case even after decision.

McCRADY & SON.

39 No. 17.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

Common Pleas.

MARY A. HYATT *et al. vs.* WILLIAM McBURNEY *et al.*

The defendant, Caroline Carson, excepts, for the purpose of an appeal to the Supreme Court, to so much of the decree of his honor Judge Pressley as decides that the plaintiffs have a valid mortgage on the property mentioned in the pleadings, or any lien thereon, superior to the mortgage of Ball to the executors of Carson, which in the case in the Supreme Court of the United States to which McBurney, the mortgagor, was a party, was adjudged a subsisting mortgage when McBurney became purchaser of the property, and prior to the date of the mortgage to the plaintiff's testator.

A. G. MAGRATH,
JAMES LOWNDES,
Attorneys for Caroline Carson.

We acknowledge service of a copy of the within paper, but do not waive our objection to the fact that the time for an appeal has passed.

September 20, 1880.

McCRADY & SON.

40 *Opinion.*

No. 18.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court. April Term, 1881.

MARY A. HYATT *et al. vs.* WILLIAM McBURNEY *et al.*

SIMPSON, *C. J.*:

In December, 1862, Hyatt, McBurney & Co., of the city of Charleston, purchased from Elias N. Ball, a citizen of South Carolina, a certain tract of land known as Dean Hall, situate in Charleston county, at the price of $100,000. This tract had been purchased in 1857 by Ball from the executors of W. A. Carson, deceased. Ball had given his bond for the purchase-money, with a mortgage of the premises to secure its payment. This bond and mortgage had been satisfied with the executors of Carson by Ball about the time he sold to Hyatt, McBurney & Co.

A short time after this purchase by McBurney & Co., Hyatt con-

cluded to withdraw from the firm, and he conveyed his interest in the Dean Hall property to the surviving members of the firm, to wit: William McBurney, Wm. Hasseltine, Alfred L. Gillespie, and Thos. R. McGahan. Upon the withdrawal of Hyatt the firm was found indebted to him some $40,000. For this sum McBurney & Co. gave their bonds, with a. mortgage of the Dean Hall land, to secure their payment.

After the war Mrs. Caroline Carson, one of the legatees and de-
41 visees of her husband, and who had become sole party interested in the estate, being a resident of the State of New York, instituted proceedings in the United States court denying that the Ball mortgage had been legally satisfied (it had been paid off during the war with Confederate money), and praying that it might be set up against the Dean Hall tract and be foreclosed. Hyatt was not made a party to this proceeding, but the other members of the late firm had been. This case was heard on circuit, and was taken to the supreme court. The satisfaction of the mortgage was held fraudulent and a foreclosure ordered. It was expressly stated, however, that, as Hyatt had not been made a party, the decree would not affect his rights.

After this foreclosure decree in favor of Mrs. Carson in the United States court, as above stated, and before the sale of the land, Mr. Hyatt instituted his action in the State courts claiming the foreclosure of his mortgage. To this proceeding Mrs. Carson, being made a party, appeared, and set up as a defence the illegality of the satisfaction of the Ball mortgage, and also the decree of foreclosure of the United States court as an estoppel to plaintiff's action. In the mean time she had purchased the land under this foreclosure decree. The case was referred to W. D. Clancy, Esq., one of the masters of the court, to take testimony and report the same. Upon the coming in of this report Judge Pressley found as matter of fact that "there was not a shadow of fraud, either in the circumstances attending the satisfaction of the Ball mortgage or in the nature of the payment by Hyatt, McBurney & Co. to Ball;" and he decreed as matter of law that the plaintiff had a valid mortgage on said plantation discharged of the older or Ball mortgage, under which Mrs. Carson claimed. There has been no appeal from either this finding of fact or law by the circuit judge. The judge, however, further decreed "that the obligors of the bond which plaintiff's mortgage secures, being parties to the decision of the United States court, are bound by it. It is a final adjudication, says Judge Pressley, of their rights, and I am bound to respect it. In doing so I must give it full effect, if that
can be done without impairing the lien of the plaintiff. They
42 are not entitled to enforce payment of their bond out of the property which the said decision gives Mrs. Carson if they can, without difficulty or expensive litigation, enforce payment by the obligors, who are bound by the said decision.

"Were I to decree that my profession of respect would be only a flimsy pretence.

"It is therefore ordered that this case be recommitted to Master Clancy to take testimony and report whether plaintiffs can without

difficuly or expensive litigation procure payment from the obligors of said bond otherwise than by foreclosure of said mortgage.

"The code, as construed by the supreme court of this State, requires that every case, without regard to the pleadings, be decided according to the right. To that end leave must be granted to amend pleadings even after the hearing. If Mrs. Carson be advised that amendment of her answer be necessary, leave to amend it according to the claim set up by her is hereby granted."

The plaintiff appealed, and the appeal brings up the correctness of this position of the decree. The circuit judge held that the mortgage under which Mrs. Carson claimed has been satisfied. That the mortgage of the appellant was a valid and subsisting lien on the plantation and expressly discharged from the elder mortgage of Ball. Under these circumstances we cannot see how the appellants, if they demand it, can be denied their right to foreclose their mortgage. This was the contract between the parties, and it belongs to a class of contracts which can be specifically enforced through the courts. The mortgage of the appellants did not give them the right to pursue other property of the mortgagor, but it gave a specific lien on the Dean Hall plantation—none other. The contract was that under this mortgage the mortgagee should have the right through the courts to a decree of sale of that plantation on failure of the mortgagors to meet their obligation. The decree denies this right, and requires the appellants to give up the lien which they contracted for, and to pursue property over which they had no lien.

43 The action of the appellants is primarily an action in the nature of an action *in rem*.

If they do not obtain a judgment by which the specific property embraced in the mortgage is set apart for the payment of their debt they can have only a general one on the bonds of the mortgagors, upon which they would be compelled to issue execution so as to reach such leviable property of the respondents as they might be able to find. In other words, the contract made by the parties themselves is ignored and a new one substituted by the court.

As has already been stated, the circuit judge found that the mortgage under which Mrs. Carson claims had been paid off and extinguished by Ball, the mortgagor, before he conveyed to Hyatt, McBurney & Co. And that the mortgage of the appellants was the only valid lien on the land. Mrs. Carson has not appealed from this portion of the decree.

These facts then stand as established before this court, and cannot now be disputed by her. Such being the fact, much of the argument pressed with great zeal and force by her counsel is inapplicable, and cannot be considered, because the questions to which it was addressed are not before the court.

The only question before the court is: Was the circuit judge in error when he declined to allow the appellants the benefit of the remedy which they sought, and which the facts of the case as found by the circuit judge, and admitted, so far as this case is concerned, by all the parties, including Mrs. Carson, entitled them to demand? Was the circuit judge in error in denying to appellants this remedy,

and in turning them over to another, which the appellants did not seek, and are now unwilling to receive, being different from that for which the parties contracted?

Sometimes there may be equities between defendants which should be adjusted, and when they properly arise in a case the court has power under the code to enforce them; but in endeavoring to have justice done between defendants the legal rights of the plaintiffs should not be disregarded and overthrown.

44 What is the equity of Mrs. Carson in this case, to which the rights of appellants have been subordinated?

The decree fails to furnish any tangible equity upon which the court can find a judgment in her favor.

She does not claim that appellants have a lien upon two funds, either of which would satisfy appellants' debt, and that she has a lien upon one of these, and, therefore, that appellants should be thrown upon the other. She does not show that she has paid to appellants a debt to which the doctrine of subrogation would attach.

No principle of recognized equity is involved. Her only claim is that the United States court has previously held that, as between herself and the other defendants, her mortgage was good. In that decision, however, the appellants were not parties, and the court in pronouncing judgment expressly declared that it would not bind the the appellants. That decision, therefor, is not *res adjudicata* as to them, and it has no binding force here.

Now, while we have a profound respect for the United States court and admire the learning and ability which has always characterized its decisions, and while we would most cordially yield to its authority in a case where all parties interested in the question acted upon were before the court, yet in a case like this, where all the parties in interest were not before the court, and where the rights of the absent parties were expressly reserved, and where the matters in issue have since been adjudicated by our own courts, with all parties interested present, from which adjudication there has been no appeal, we feel constrained to sustain that judgment, although it is different from that of the United States court. We think that the appellants by virtue of the circuit decree, which held that the mortgage of appellants was the only lien upon the land in question, and from which respondents have not appealed, became entitled to have said mortgage foreclosed according to the usual mode in such cases, and that it was error in the circuit judge to postpone this established right of appellants to the claim of respondent.

45 The judgment of this court is that the judgment of the circuit court be reversed, and that the cause be remanded for such further proceedings as may be necessary to enforce the principles of this opinion.

We concur:

HENRY McIVER, *A. J.*
S. McGOWAN, *A. J.*

Filed July 16, 1881.

Judgment.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

MARY A. HYATT, Executrix, &c., Appellant,
vs.
HYATT, MCBURNEY & Co., *et al.*, Respondents.

Appeal from Circuit Court, Charleston County.

Docketed April term, 1881; heard April term, 1881. No terms on docket 1.

McCrady & Son for appellant.

Magrath & Lowndes for respondents.

It is adjudged by the court that the judgment of circuit
46 court be reversed and the case remanded for such further proceedings as may be necessary to enforce the principles of the opinion of this court herein.

By the court:

Attest:

ALBERT M. BOOZER, *Clerk.* [L. S.]

July 16th, 1881.

Filed July 27, 1881.

No. 19.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

Common Pleas.

MARY A. HYATT, Executrix and Devisee, *et al.*
vs.
WILLIAM MCBURNEY *et al.*, under the name of Hyatt, McBurney & Co., and Caroline Carson.

To Hon. A. G. Magrath, attorney for Mrs. Caroline Carson.

DEAR SIR: The remittitur from the supreme court in this cause having been filed in the office of the clerk of the court of common pleas for Charleston county, you will please take notice that on Friday next, the 9th instant, at 10 o'clock a. m., or as soon thereafter as counsel may be heard, we shall move before his honor Judge J. Kershaw, at the court-house, for an order making the judgment of the supreme court the judgment of the circuit court. You will also take notice that at the same time and place we shall move for a decree of foreclosure and sale.

September 3d, 1881.

McCRADY & SON,
Plaintiffs' Attorneys.

47 No. 20.

In the Common Pleas, First Circuit, Charleston County.

THE EXECUTORS OF EDMUND HYATT *vs.* CAROLINE CARSON *et al.*

Caroline Carson, a defendant in this case, holding title to the property mentioned in the pleadings from the marshal of the United States for the district of South Carolina, at the sale of the said property, under the order of the circuit court of the United States, in pursuance of the mandate of the Supreme Court of the United States, in the case of Caroline Carson *versus* William McBurney and others, in which foreclosure of the mortgage and sale of said property was asked by Caroline Carson *versus* William McBurney and others holding title from Elias N. Ball, she being entitled to the benefit of the said mortgage, which had been given to secure the payment of the purchase-money, now excepts to the order proposed in this case, and of which she has received notice that the same will be asked, because the only judgment or decree which this court can make in this case, under the Constitution and laws of the United States, is that which gives the plaintiff, as the holder of a lien second to that of Caroline Carson, the right to redeem the said property.

And this for the following reasons:

First. The decree of the Supreme Court, in the case of Carson *vs.* McBurney *et al.*, was a final adjudication by a court of paramount authority of all issues before it in that case, in which issues necessary parties were before it, and in which, of the cause of action and of the parties before it, that Court had jurisdiction.

48 Second. That in that case the issue was simply as to the title of McBurney and his copartners to the Dean Hall plantation, and whether they took their title incumbered with the mortgage from Ball to the executors of Carson to secure the purchase-money due by Ball; Hyatt, who had been jointly interested with McBurney and the other copartners of Hyatt, McBurney and Company in the purchase from Ball had released to his copartners his interest as co-owner of the property. And when he, at his retirement from that copartnership, took from his remaining copartners a mortgage of this property to secure their indebtedness to him, he took from them that interest or estate which their title enabled them to claim or to give to him.

Third. That by the decree of the Supreme Court of the United States there was finally adjudged, first, that although the purchase by Hyatt, McBurney and Company was paid for to Ball in Confederate currency, that transaction, not impeached by Ball, gave to the purchasers a fee-simple in the property so purchased, but that the payment in Confederate money to the executor of Carson was not a payment of the bond of Ball for the purchase-money, secured by his mortgage, and that the title of McBurney and others of their copartnership, and which they held at the filing of the bill in the United States court (Hyatt having then released his interest in the

property to his other copartners) was taken subject to the mortgage of Ball to the executors of Carson, and the beneficial interest in that mortgage was in the plaintiff in that case.

Fourth. That so there was finally adjudged by the Supreme Court of the United States the title of McBurney and others, including therein the release of the interest of Hyatt to his copartners, and as affecting that title, and to which it was to be held subject, the mortgage of Ball, the granting to McBurney and others, which mortgage was made for the purchase-money to the executors of Carson, the beneficial interest in which said mortgage being
49 vested in Caroline Carson, the plaintiff in the bill in the United States court.

Fifth. That when the Supreme Court of the United States, in the issues before it, decided that the bond of Ball for the purchase-money had not been paid, and that the mortgage to secure that bond had not been discharged, and that court had before it the party claiming that the bond was not paid and the mortgage had not been discharged, the party, the obligor in the bond, or his representatives, and who made the mortgage, and the purchaser from him who took and held title from him to the property so mortgaged, all the parties were before the court necessary or proper for the decision of the issue as to the title of the purchasers from Ball, and the subjection of that property held under that title to the mortgage made by Ball of that property to secure the payment of the purchase-money.

Sixth. That with the question of the correctness of that decision, or with the sufficiency of the proof exhibited to the court, or with the *ratio decedendi* of the court, there is no lawful power or authority in the courts of any State to question, review, reverse, or qualify the same. That a question of fact, or a rule or law, or a right established or denied by the Supreme Court of the United States, is final and conclusive upon all other courts of the United States or of any State. That rights vested under the judgment or decrees of the Supreme Court of the United States are so vested by the authority of the United States, established by the supreme law of the land, and the judges in every State are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. And it is thus that this court will accept and enforce the judgment of the Supreme Court of the United States wherein it establishes the mortgage of Ball as a security binding the Dean Hall plantation, in the possession of McBurney and others, holding title from Ball for the payment of the purchase-money; to which payment
50 and the benefit of the mortgage to secure the same Caroline Carson filed her bill in the United States court.

Seventh. That, therefore, the mortgage from Ball to the executors of Carson, the beneficial interest in which was in Caroline Carson, the plaintiff, in the United States court, seeking to foreclose the same, and for sale of Dean Hall, the mortgage having been established as a lien affecting the property and not discharged by payment of the debt secured by it, title to which, freed from the mortgage, was claimed by the parties who only were the owners of the

same—that mortgage was adjudged a security valid and binding the property set forth in it; and the judgment of the Supreme Court of the United States was the final adjudication of a right in Caroline Carson which could not be questioned, reviewed, reversed or qualified by any other court.

Eighth. That when in the judgment of the Supreme Court of the United States it is said that whatever may be the rights of Hyatt, they are not concluded by the judgment in a case to which he was not a party, such rights must be understood as those which belong to the relation in which he stood to the property set forth in the mortgage from Ball to the executors of Carson, and that was the relation of a mortgage from his copartners in the firm of Hyatt, McBurney and Company. That in these rights could not be considered that of disputing the judgment of the Supreme Court of the United States, in which there was the final adjudication of the question that the payment by Ball to the executors of Carson, in Confederate currency, was not payment of his bond given to the executors of Carson for the purchase-money of Dean Hall; that the mortgage by Ball to secure the payment of that bond was not discharged, but was of binding force and validity as a security for the said bond, and to be enforced by a sale of the mortgaged property for the payment of the said bond. That the rights of Hyatt, or his representatives, were only such as were in subjection to these points, adjudicated finally by the Supreme Court of the United States, and
51 to hold that in saving whatever may be the rights of Hyatt or his representatives the Supreme Court of the United States is to be considered as in its judgment upon the questions of the payment of Ball's bond in Confederate currency, and the discharge of the mortgage to secure that bond because of such payment, making its judgment upon these questions subject to review or reversal in the courts of this State is to construe that judgment so that its whole force and effect is destroyed and rendered idle in its intent and null and void in its effect.

Ninth. That to hold the judgment of the Supreme Court of the United States as other than a final adjudication of the question of the effect of a payment in Confederate currency of the bond of Ball to the executors of Carson, and of the validity of the mortgage to secure the payment of that bond, is to affirm the right of the court of the State to review and reverse the judgment of that court as to these issues. And when the court of a State will decide that in this case the bond of Ball if paid in Confederate currency was thereby paid in law and, so paid, the mortgage to secure the same was discharged, is simply to affirm the proposition that in the proceedings before the Supreme Court of the United States there was no cause of action before that court, and, therefore, the proceedings before it to foreclose the mortgage from Ball to the executors of Carson, and the judgment of that court upon those proceedings, were all irregular, void, and of no effect.

Tenth. That in this case in the court of the State in which Caroline Carson set up the mortgage from Ball to the executors of Carson as a prior lien to that claimed by the executors of Hyatt, there

was no question of fraud made in the pleadings or raised in the evidence. That with the view taken by the Supreme Court of the United States of the purchase from Ball, and the payment in Confederate currency to the executors of Carson, and with the conclusions of that court upon the case before it, no court of the
52 State has the power to review or reverse the same. That into the proofs before the Supreme Court of the United States, or its conclusions, no court of the State has the right to look into the same or to review or reverse the same. And when in the case in the court of the State no issue of fraud is raised in pleadings or the proof, and such an issue appears decided by the Supreme Court of the United States in issues pending before it, in which Caroline Carson was the plaintiff and McBurney and others of his copartners defendants (except Hyatt, who had released his interest as co-owner and taken from a mortgage of the property), a judgment of the court of the State in the cases before it, deciding a point not raised in such case, but decided by the Supreme Court of the United States in the case before it, and where the parties directly connected with that issue were before it, deciding adversely to the judgment of the Supreme Court of the United States, under which judgment rights have been vested, is in derogation of the judicial power of the United States and of the authority of the Supreme Court of the United States.

A. G. MAGRATH,
With whom is H. E. YOUNG,
For Caroline Carson.

Filed September 9, 1881.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas.

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

The defendant, Caroline Carson, further excepts to the decree
53 of his honor Judge Kershaw, and to the other decrees and decretal orders in this cause, because, by the decree of the circuit court and of the Supreme Court of the United States in the cause entitled Carson *vs.* Robertson, and set out in the cause first above named, Edmund Hyatt in his lifetime was a subsequent mortgagee of Dean Hall plantation to Caroline Carson, and consequently, though not a party to the said cause entitled Carson *vs.* Robertson, was bound by the judgment therein. The plaintiffs in this cause, as representing him since his death, are equally bound. The decison, therefore, which gives to them a lien on the Dean Hall plantation superior to the title which Caroline Carson has taken and holds, under a foreclosure of the mortgage held by her, and under an authority exercised under the United States, refuses to give effect to the judgment of the court of the United States rendered upon the point in dispute, and is therefore error.

A. G. MAGRATH,
For Caroline Carson.
H. E. YOUNG,
With Him.

Filed September 9, 1881.

No. 21.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

Court of Common Pleas.

MARY A. HYATT, as Executrix, Devisee, and Heir-at-law of Edmund Hyatt, deceased, *et al.*

vs.

WILLIAM MCBURNEY *et al.*, Under the Name and Style of Hyatt, McBurney & Co., and CAROLINE CARSON.

On presentation and filing of the remittitur from the Su-
54 preme Court in this cause, and on motion of McCrady & Son, plaintiffs' attorneys, it is ordered that the judgment of the Supreme Court in this cause be made the judgment of this court.

J. B. KERSHAW,
Presiding Judge.

September 9th, 1881.

No. 22.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

Exceptions of Caroline Carson to the order of the court making the decree of the Supreme Court the decree of this court, viz:

The defendant renews her exceptions heretofore filed to the said order when proposed.

A. G. MAGRATH,
For Caroline Carson.
H. E. YOUNG,
With Him.

55 No. 23.

Decree for Foreclosure.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

In the Common Pleas.

MARY A. HYATT, as Executrix and as Devisee and Heir-at-law of Edmund Hyatt; Joaquin Delmonte, Executor of the said Edmund Hyatt; Mary E. Hyatt, Widow and Heir-at-law of the said Edmund Hyatt, and Julia Delemonte, as Devisee and Heir-at-Law of the said Edmund Hyatt,

vs.

WILLIAM MCBURNEY, WILLIAM HASSELTINE, ALFRED L. GILLESPIE, and Thomas R. McGahan, Members of the Late Firm of Hyatt, McBurney & Co., and Caroline Carson.

Upon the filing of the remittitur in this cause, and hearing opinion of the Supreme Court herein, and on motion of McCrady & Son, plaintiffs' attorneys—

It is ordered, adjudged, and decreed that there is due and owing

to the plaintiffs herein upon the bond secured by the mortgage set out in the complaint, as appears by the report of Master W. D. Clancy, the sum of ten thousand ($10,000) dollars, with interest thereon from the first day of January, A. D. 1879.

It is further ordered, adjudged, and decreed that the mortgaged premises described in the complaint in this cause, as hereinafter set out, or so much thereof as may be sufficient to raise the amount so found to be due to the plaintiff herein for principal, interest, and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction by Master W. D. Clancy
56 on the usual terms of cash and credit—that is to say, one-third cash and the balance in one and two years, secured by bond or bonds and mortgage of the premises; that the said master do give public notice of the time and place of such sale according to the law and practice of this court; that the plaintiffs, or any of them, or any other party to this suit, may become a purchaser at such sale; that the said master do execute and deliver to the purchaser or purchasers a deed or deeds of the premises so sold; that out of the proceeds of the said sale, after deducting the amount of his fees and the expenses of said sale, and any lien or liens upon said premises at the time of such sale, for taxes and assessments, and the costs of this action to be taxed by the clerk of this court, he do pay to the plaintiffs or their attorneys the sum of ten thousand dollars, with interest thereon from the first day of January, A. D. 1879, or so much thereof as the cash portion of the purchase-money of the said mortgaged premises will pay of the same; and that he do assign the bond and mortgage, or bonds and mortgages, given by the purchaser or purchasers to secure the credit portion of the purchase-money, to the plaintiffs or their attorneys; and that he take a receipt of the plaintiffs or their attorneys for the amount so paid, and file the same with his report of sales; and that the purchaser or purchasers of such sale be let into possession of the premises on production of the deed or deeds; that should the mortgaged premises sell for more than enough to pay the mortgaged debt, together with the costs of this suit and expenses of said sale, he do pay over any surplus to Mrs. Caroline Carson, one of the defendants herein, or her attorney, and take a receipt therefor, and file the same with his report; that he make a report of such sale and file it with the clerk of this court with all convinient speed; that should the proceeds of said sale be not enough to pay the mortgage debt, together with the costs and expenses of this suit, leave is given to the plaintiffs to apply at the foot of this decree for such further orders as may be necessary.

57 And it is further ordered, adjudged, and decreed that the defendants, or any persons claiming under them, or any or either of them, after the filing of the notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

The following is a description and the particular boundaries of the premises to be sold, as hereinbefore directed, to wit: All that plantation or tract of land known as Dean Hall, situate on Cooper

river, in St. John's parish, Berkley, in the county of Charleston and State aforesaid, butting and bounding to the east on Cooper river; to the northwest on lands formerly of William Colleton, but now or late of John Harleston and Dr. William Moultrie; to the west on White Hall plantation, hereinafter described; to the south on lands formerly of J. E. Holmes, now of Peter Gourdin, and having such form, dimensions, and descriptive marks as are represented on a plat thereof made by Henry Ravenal, surveyor, in March, 1827, and containing twenty-six hundred acres, be the same more or less. Also all that tract of land situate in the same parish, known as White Hall, bounding east on Dean Hall; northeast on lands of John Harleston and Dr. William Moultrie; northwest on land formerly of H. S. Ball, deceased, now of James Poyas, and southwest on land formerly of John C. Ball, and afterwards of William Ball, deceased, and having such form, dimensions, and descriptive marks as are represented on a plat made by R. Q. Pinckney, surveyor, in April, 1837, and containing five hundred and twenty-six acres and twenty-three hundredths of an acre, more or less. Also all that parcel of land in the same parish, containing thirty-five acres and twenty-one hundredths of an acre, bounding north and east on Chicken creek, and south and west on Midway or Back river, as the same was granted to W. A. Carson by the State aforesaid on the fourth day of September, A. D. 1843.

Provided that the said premises be not sold before the first Monday in December next.

Sept. 9, 1881.

J. B. KERSHAW,
Presiding Judge.

Filed September 9, 1881.

58 No. 24.

Notice of Appeal.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

Please take notice that this defendant, Caroline Carson, appeals to the supreme court of South Carolina from the decree of his honor Judge Kershaw filed in this cause on the 9th day of September, A. D. 1881, and will move the supreme court of this State to reverse the same on the grounds more specially set forth in the exceptions filed on behalf of this defendant, Caroline Carson, to the same.

And the said Caroline Carson will move further before the supreme court to reverse the order of his honor Judge Pressley refusing the removal of the above-entitled cause to the circuit court of the United States for the district of South Carolina; and further, that for all matters and things in the order of Judge Pressley she has now a perfect right of appeal to this supreme court, as the said order was interlocutory, and did not conclude her right of appeal until the matters and things therein of which she could complain were fixed by a decree in the circuit court. In the exercise of

this her right she will insist that Judge Pressley erred in holding as follows:

"I find here not a shadow of fraud, either in the circumstances attending the said satisfaction, or in the nature of payments."

59 And in holding "that the plaintiff has a valid mortgage on said plantation discharged of the said older mortgage."

JAMES LOWNDES,
And with him A. G. MAGRATH AND
H. E. YOUNG.

(Endorsements on the above.)

THE STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

Rob't G. O'Neale, being duly sworn, says: That he is clerk in the office of Rutledge & Young, and that on the 19th day of September, A. D. 1881, he served McCrady & Sons, attorneys for defendant McBurney, with a copy of the notice of appeal by leaving the same at the office of the said McCrady & Sons between the hours of six in the morning and nine in the evening, to wit, at seven in the evening of the day aforesaid, there being no person in said office at the time of such service.

ROB'T G. O'NEALE.

Sworn to before me this 20th day of September, A. D. 1881.
JENNINGS W. PERRY,
Notary Public.

60 I certify that the notice of appeal within and the grounds were received by me through a duplicate original as to the notice, and by a copy and telegram as to the grounds of appeal, other than the exceptions filed at the hearing, which I received in the duplicate original on the 19th September, 1881.

J. B. KERSHAW,
Presiding Judge.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

Personally appeared before me R. G. O'Neale, who, being duly sworn, says: That he is clerk in the office of Rutledge & Young; that on the 20th September, 1881, he went to the office of Messrs. McCrady & Sons for the purpose of getting them to acknowledge service of the within notice of appeal, which had been left by him at said office the day before; that he found no one in the office, but saw the copy of said notice upon the desk of Mr. Ed. McCrady, Jr.

R. G. O'NEALE.

Sworn to before me this 10th day of October, 1881.
JENNINGS W. PERRY,
Notary Public.

Filed September 29, 1881.

61 25.

Additional Ground of Appeal.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

MARY A. HYATT *et al. vs.* WILLIAM MCBURNEY *et al.*

For a further ground of appeal the defendant, Caroline Carson, says that having complied with the provisions of the act of Congress of the 3d March, 1875, regulating the removal of causes from the State courts to those of the United States (18 Statutes at Large, 470), by filing her petition in this cause for the removal thereof from the State court to the United States court for the district of South Carolina, and by giving the bond required by said act, and by the filing the transcript of the record of the State court in the circuit court of the United States for South Carolina district, as was done by her on the 9th day of March, A. D. 1880, all rightful jurisdiction of the State court ceased, and all further proceedings thereon are null and void.

A. G. MAGRATH,
For Caroline Carson.
H. E. YOUNG,
With Him.

We acknowledge that a copy of this paper was served on us this day, 30th September, 1881.

McCRADY & SONS.

Served October 1, 1881.

J. B. KERSHAW,
Presiding Judge.

Filed October 4th, 1881.

62 Abraham Van Vechten was duly made a party plaintiff by order filed 6th March, 1880.

Judgment by default was duly entered on 6th December, 1879, against William McBurney and Thomas R. McGahan, and the absent defendants were duly served by publication.

The affidavit of E. McCrady, Jr., *supra*, page 6, was duly filed 15th October, 1881.

The answer of Caroline Carson, *supra*, pages 6–11, was duly filed 31st January, 1880.

It is agreed by counsel that the preceding pages contain a true statement of this cause and form the case, with exceptions, upon which it is to be heard in the Supreme court, and that these have been duly filed and served.

The plaintiffs, nevertheless, deny the right of Mrs. Carson to appeal now, and will move, at the proper time, to dismiss her appeal. Their right to move this dismissal is mutually reserved and conceded.

JAMES LOWNDES,
A. G. MAGRATH,
H. E. YOUNG,
For Appellant.
McCRADY & SONS,
For Respondents.

On argument the court refused to dismiss Mrs. Carson's appeal, & on hearing the case made the following decree:

63 No. 26.

Opinion.

THE STATE OF SOUTH CAROLINA:

In the Supreme Court. April Term, 1882.

MARY A. HYATT, as Executrix and Devisee and Heir-at-Law of Edmond Hyatt, Joaquin Delmonte, Ex'or of the said Edmond Hyatt, Deceased, & Julia Delmonte, &c.,

v.

WILLIAM MCBURNEY, WILLIAM HASSELTINE, ALFRED GILLEPSIE, and Thomas R. McGahan, of the Late Firm of Hyatt, McBurney & Co., and Caroline Carson.

SIMPSON, *C. J.:*

The facts of this case not controverted are as follows:

Edmond Hyatt, late a citizen of the State of New York, together with William McBurney, William Hasseltine, Alfred L. Gillepsie, and Thomas R. McGahan, in December, 1862, and for some
64 time prior, were copartners doing business under the name and style of *of* Hyatt, McBurney & Co., in the city of Charleston. In December, 1862, this firm purchased from one Elias N. Ball a certain plantation located in Charleston county, known as Dean Hall, for one hundred thousand dollars, which was paid in Confederate treasury notes. The land had been purchased by Ball in 1857 from the executors of William A. Carson, deceased, partly for cash and partly on credit, the credit portion being secured by a mortgage of the premises executed to said executors.

And it was the understanding between McBurney & Co. and Ball that he should extinguish this debt and have the mortgage delivered up and cancelled. This was done by Ball with so much of the Confederate money received by him from McBurney as was necessary. This transaction took place between Ball and one
65 of the executors, Robertson the other of the two had qualified, having before that time left the State.

In May, 1863, the copartnership of Hyatt, McBurney & Co. being about to expire, Hyatt sold his interest in the concern and in the "Dean Hall" place to the other members of the firm in consideration of $50,000 and withdrew. This sum being secured to the said Hyatt by the bond of the new firm with a mortgage of the "Dean Hall place."

This place had formerly belonged to William A. Carson. Carson died in 1856, testator leaving a widow, Mrs. Caroline Carson, and two minor sons, William and James Petigru Carson. In his will he appointed Alexander Robertson and John Freer Blacklock his executors, and after making certain specific bequests he directed his

executors to sell the residue of his estate, the proceeds to be
66 applied, first, to the payment of his debts, and then the balance to be divided into three equal parts, one-third to be held by them in trust for his wife, Caroline, during her life and the other two-thirds for his sons, William and James Petigru, to be paid to them, absolutely, *in* their attaining their majority.

Under this power of sale, with which the executors were invested, Alexander Robertson and John Freer Blacklock, after qualifying, proceeded to sell the estate, selling the "Dean Hall place" to Elias N. Ball for $50,000, the larger portion being on a credit, which was secured by mortgage of the premises, executed on *on* 2 March, 1857.

After the late war between the States had ended, to wit, on the 11 of August, 1866, Mrs. Carson, who had become the owner of her sons' interests under the will of their father, and who was living in the State of New York, instituted, in her own name, proceedings
67 in the circuit court of the United States for the district of South Carolina to have the bonds of Ball surrendered by Robertson, the executor, declared valid, and subsisting securities and the mortgage to [be] given to secure them, a valid and subsisting lien on "Dean Hall," (notwithstanding it had been cancelled), and praying a foreclosure thereof. To this proceeding all of the members of the late firm of Hyatt, McBurney & Co. were made parties, except Hyatt, who could not be impleaded, because he was a citizen of New York, of which State, the plaintiff was also a citizen. The case was, however, heard as to the other parties, the circuit court sustaining the complaint of the plaintiff and ordering the foreclosure, which decree, upon appeal, was ultimately affirmed by the Supreme Court of the United States at its October term, 1878, 99 U. S., 571.

The judgment of the court was based in part on the ground
68 of fraud in the transaction between McBurney & Co., Ball, and Robertson, expressed in the following strong terms, as found in the opinion: "There was evidently a plot; McBurney & Co. were its contrivers; Ball was its instrument; Robertson was their dupe, and the Carsons the victims." Under this decree "Dean Hall" was sold by the marshal for the district of South Carolina on the 26 November, 1879, Mrs. Carson being the purchaser.

In the meantime, to wit, on the 15 of October, 1879, the plaintiffs, as executrix, executor, and heirs-at-law of Hyatt, then deceased, instituted the action below for the foreclosure of the mortgage from McBurney and Gillespie to the said Hyatt above referred to. To this action Mrs. Carson was made a party defendant, who, failing to answer within the required time, the case as to her was placed on Calendar 6 for judgment. She, however, afterwards appeared and
not granted, on the 16 December, 1879, further time to
69 answer, consenting to an order of reference. The answer was filed on the 31 Jan'y, 1880, thereafter.

In this answer Mrs. Carson, after stating the death of her husband, the fact that he left a will, the sale by his executors of the Dean Hall place to Ball and several other unimportant facts, avers

that on and before the 4 of June, 1857, all the debts of the estate having been paid, the executors made distribution of the assets and transferred to themselves, as trustees under the will, the Ball bonds and mortgage, to wit: to themselves, as trustees of herself, one bond of $9,000 and one-third interest in one bond of $4,000, and to themselves, as trustee of her two sons, the same amount for each in bonds, making, in the aggregate, $31,000 in bonds, and that they then took and held, as said trustees, the mortgage of Dean Hall, securing the said debt of $31,000.

70 That the said mortgage was not satisfied until the 21 of July, A. D. 1866, when she alleged that Robertson alone, and at the instance of McBurney, executed a satisfaction on it; that at the time of the surrender of the Ball bonds by Robertson they could have been exchanged in the market for more than double the amount in Confederate treasury notes of their face value, and finally she interposed the decree of the Supreme Court of the United States, and claimed that the plaintiffs were estopped by that decree from denying the validity of the said bonds and mortgage held by Robertson, as trustee, as aforesaid, or their priority to that of plaintiffs, and that the plaintiffs could not enforce their mortgage without first redeeming the Ball mortgage.

The case, as has been stated, was referred to the master, who proceeded to hold the reference, when, after one or two sittings,

71 Mrs. Carson, through her att'y, gave notice to the master that he had that day filed a petition in the clerk's office, praying, among other things, the removal of the cause into the United States court, and that he would not continue the reference before him.

Whereupon the att'y of the plaintiffs moved that the master file his report of the testimony taken under this state of things; the case came for hearing before Judge Pressley, who dismissed the petition for removal, holding that the defendant under the circumstances was not entitled to the motion, it appearing in the answer by her own statement that she was a citizen of the same State as the plaintiffs, the State of New York, and no affidavit being submitted that this statement was erroneous or inserted by mistake; and, further, that the petitioner came too late, it having been presented after filing of her answer in the cause, and after the master, attended by

72 the attorneys on both sides, had finished taking the testimony offered by the plaintiff, and moreover that the petition was not properly verified, the affidavit of the attorney not being sufficient to justify him in disregarding the positive statement in the answer of Mrs. Carson as to her citizenship.

Judge Pressley then proceeded to hear the case on its merits, finally pronouncing a decree, in which he stated "that he found not a shadow of fraud, either in the circumstances attending the satisfaction or in the nature of the payment, and that, in the absence of all proof in that respect, he would follow the decisions of the supreme court of this State and hold that plaintiff had a valid mortgage on said plantation discharged of said older mortgage." Upon the findings in

this decree a judgment of foreclosure in favor of the plaintiffs
73 was ultimately pronounced by the circuit court, and now from this judgment this appeal has come.

The appeal is urged upon four grounds:

1st. That the judgment of the Supreme Court of the United States in McBurney *v.* Carson, 99 U. S., —, is conclusive of the case on the principle of *res adjudicata;*

2nd. That the court below should have let go its jurisdiction upon the filing of the petition for removal by the defendant, and upon the facts therein stated;

3rd. "That Judge Pressley erred in holding that he found not a shadow of fraud, either in the circumstances attending the satisfaction of the mortgage or in the nature of the payments;" and

4. That he erred "in holding that the plaintiff had a valid mortgage on said plantation discharged of the said older mortgage."

74 These grounds we will consider in the order in which they are stated.

We have been somewhat surprised at the earnestness with which the appellant has pressed upon the court the first ground of appeal in the face of the language of the decree which she invokes.

How could the Supreme Court of the United States have expressed more distinctly its own opinion that the rights of Hyatt were not being adjudicated in the cases of Carson and Robertson and McBurney & Carson than in the following language found in the opinions:

"If he (Hyatt) shall not be made a party and the complainant shall be successful, his rights will not be effected by the decree. In such case he can file a new and independent bill, and renew the litigation as to all the questions touching the prior mortgages which are involved in this controversy. The complainant has the option
75 to make him a party, or to proceed without him and take the hazard of the consequences." Carson *v.* Robertson, 19 Wallance, 106.

Could language be stronger or more direct to the point? Again the Court said:

"This Court has held that Hyatt was not an indispensable party, as the decree would not affect his rights." McBurney *v.* Carson, 99 U. S., 569.

Mr. Justice Swayne, who delivered the opinion of the Court in both of these cases, in support of the principles announced, refers to Haynes *vs.* Beach, 3 Johns., ch. 459, where Chancellor Kent speaks as follows:

"The necessity of making the subsequent encumbrances parties, as holding their rights unimpa-red, appears to be much stronger, and is indispensable to justice in cases of decrees for sale according to our practice, for otherwise the mortgagor would take the surplus money, or the cash value of the equity of redemption, and
76 defeat entirely the lien of the subsequent creditor. But their rights cannot be destroyed in this way, and the purchaser will take only a title against the parties to the suit, and he cannot set it up against the subsisting equity of those encumbrances who are not parties."

The court seems to have anticipated that the question of *res adjudicata* might arise in future as to Hyatt, and to prevent its interposition and to free it from all doubt these expressions appear to have been used. See also Horn *v.* Lockhart, 17 Wall., 579.

It will not do to say that these expressions were *obiter*, because the very question in the case of Carson *v.* Robertson was whether Hyatt was an indispensable party, which necessarily involved the further question as to the affect of the judgment of the court upon Hyatt's rights and interests. Instead, therefore, of the case of McBurney & Carson being *res adjudicata* against Hyatt, and concluding
77 him, it is rather *res adjudicata* for him; rather a judicial determination that he has not been concluded, and that all the questions, both of law and fact, involved in that case, though decided against the parties before the court, were especially left open for him.

But, independent of this, the authorities relied on by the appellant fail to sustain her position. It is true no one can doubt the propositions announced in appellant's argument, to wit: that "such effect as would belong to a judgment- of the courts of this State, should be given to the judgments of the courts of the United States rendered under similar circumstances." Dopassenn *vs.* Rochereon, 21 Wall., 135.

"That judgments of the courts of the United States, when relied on in the State courts, have the same effect as judgments of the other States." Story'- Conflict of L., sec. 609.

"That circuit and district courts of the United States certainly cannot be considered as foreign in any sense of the term,
78 either in respect to the State courts in which they are, or as respects the circuit or district courts of another circuit or district. On the contrary, they are domestic tribunals whose proceedings all other courts of the country are bound to respect.

"That full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Art. IV, sec. 1, Const.

These are all sound as general rules, and this court will never wantonly or heedlessly violate the spirit which they breathe. It fully recognizes the fact that the judiciary organized under the General Government, as well as that of all the States, is engaged in the same great work of a common country (for the advancement of the interests & welfare), and not only will full faith and credit be given here to the proceedings of the courts elsewhere, but all due respect will be paid to their judgments.

In reaching our conclusions we are willing to be aided
79 from any quarter, and especially do we rely upon the opinions pronounced by learned and distinguished judges elsewhere; but do these principles warrant the conclusion which the appellant seeks to draw from them as applicable to the questions involved in her appeal?

We think there is a wide gap between them as premises, and the conclusion which the appellant desires this court to enforce. She invokes, in substance, the plea of *res adjudicata*. The question for

this court, then, to determine is not whether we shall pay proper respect to the judgment of the Supreme Court of the United States, but whether, according to the principles which govern the plea of *res adjudicata*, it is applicable to this case. What are those principles? They have been recently laid down by the court, as we understand them, in the case of Mauldin *vs.* Gossett, 15 S. C.

We held in that case for this plea to be effective the con-
80 currence of four conditions *was* required: 1st. Identity of the thing sued for or in controversy. 2. Identity of the cause of action. 3. Identity in the persons or parties; & 4. Identity in the quality of the persons for or against whom the claim is made, and this court said: If any one of these unities is wanting, and especially the unity of parties, the plea cannot be made out, because, while it is just and proper that litigation between the same parties, after they have once had their rights adjudicated by a competent tribunal without appeal, should end, yet a thing done between others ought not to injure another. A transaction between two parties ought not to operate to the disadvantage of a third. The maxim *res inter alias acta ocere non debit* is as strong for the protection of those not before the court as that of *res adjudicata* for those who are present. These four unities are all necessary to the plea of *res ad-*
81 *judicata*, but of the four that of the parties is perhaps the most important. In fact, it is absolutely essential, because the court has no jurisdiction over one not before it. Here it was a recognized fact that Hyatt was not before the court. The necessity of his presence was one of the questions in the case, the court holding, as has already been stated, that this was not indispensable as to the rights of those who were present, but expressly declaring that Hyatt could not and should not be prejudiced. In several of the cases cited by appellant the parties were the same in both courts. Such was the fact in Christmas *v.* Russel, 5 Wall., 590; Mills *v.* Davega, 7 —, 483, and McIntyre *v.* Cohen, 13 Pet., 324, and the question was what effect should be given to the proceedings of the first court in such cases. The principles announced in these cases are not controverted, but they have no application here. In Dru-
passenn *v.* Rachereon, 21 Wall., 135, the facts were somewhat
82 similiar to the facts here. Judgment had been rendered by the circuit court of the United States for a party declaring that his mortgage was the first lien on the land, and the marshal sold the property clear of all prior liens, the mortgagee being the purchaser. This judgment and sale was set up by way of defence to a suit brought in the State court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit. The State court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit.

The case was brought to the Supreme Court of the United States by writ of error, and this Court held that the State court did not refuse to accord due force and effect to the judgment; that such a

judgment in the State courts would not be conclusive on the
83 point in question, and the judgment of the circuit court could not have any greater force and effect than judgments in the State courts. Extract from syllabus of Dapassenn *vs.* Rochereon, 21 Wall, p. 130.

In Green *vs.* Von Boskirk, 5 Wall, 307, Von Boskirk was held bound by a proceeding to which he was not a party, and this, at first view, would seem in conflict with the position taken above, but upon an examination of the case this we think will be found to be a mistake. Bates owned certain safes in Chicago; these he mortgaged to Burkirk, in the State of New York, but the mortgage was not duly recorded in Illinois, and possession was not delivered to Boskirk. Green attached the safes in Chicago after the date of the mortgage to Boskirk and sold them and received the proceeds. Boskirk sued Green in New York for these proceeds. Green pleaded the
84 proceedings in Illinois. The court in New York disregarded the Illinois judgment, and decreed for Boskirk. The Supreme Court of the United States held that this was error, and that the judgment in Illinois was binding upon Boskirk, although he was not a party to that proceeding. This decision, however, was based upon the fact that in the proceeding in Illinois the court then had given construction to the law of Illinois as to recording mortgages and the necessity of delivery of property to pass the *the* title, which construction, upon a familiar principle, was binding upon other courts, and, therefore, should not have been disregarded by the court in New York. But the Court also held that, notwithstanding the proceeding in Illinois adjudicating the safes to Green, Boskirk would still have the right to set up title to the property if he had such as was superior to that conferred by the attachment proceedings
85 in Illinois, and, further, that he had the right to show that the property was not liable to attachment, from all of which he would have been barred had he been a party to that suit.

In other words, he was bound by the construction of the Illinois statute by the Illinois court, but not by the facts of a case to which he was no party. This case thus understood fails to support the appellant.

We feel constrained to overrule the first ground of appeal, both upon principle and authority.

2nd. Did Judge Pressley err in refusing the removal of this cause to the circuit court of the United States for the district of South Carolina? Judge Pressley, in his order refusing the motion to remove, gives the reasons for his action. They seem to us to be quite sufficient and to be sustained by authority. It did not appear from the record of the case to the satisfaction of Judge Pressley that the parties were citizens of different States, nor was the petition
86 filed within proper time, as required by the act of Congress. Chief Justice Waite, in the Railway Co. *vs.* Ramsay, 22 Wall., 328, said:

"To sustain a transfer of a suit the party claiming it must file in the State court a petition therefor and tender the requisite security. Such petition must state facts sufficient to entitle him to have the

transfer made. This cannot be done without showing that the circuit court would have jurisdiction of the suit when transferred. The one necessarily includes the other. If upon the hearing of the petition it is sustained by proof the State court can proceed no further."

The facts stated in this petition were, perhaps, sufficient to entitle the petitioner to the order had the petition been filed within proper time, and had the facts stated been sustained by the record as a whole, but the petition broke down at both of these points. It
87 was not filed as required by the act of Congress (1875) at or before the term at which the suit could have been tried; nor did it appear upon the face of the record that the citizenship of Mrs. Carson was in Massachusetts. True, this fact was stated in the petition, but her answer distinctly stated that she was a citizen of New York. Thus the record on its face failed to show the important fact required for removal. Meyer *v.* Construction Co., 100 U. S., 457. Hence Judge Pressley had no other alternative but to dismiss the petition upon both of the grounds mentioned.

3d. Appellant insists that Judge Pressley erred in holding as follows: "I find here not a shadow of fraud, either in the circumstance attending the said satisfaction or in the nature of the payments."

We have carefully examined the evidence reported by the master, and upon which Judge Pressley heard the case, and we not only fail to see that his finding of fact in this respect is either without
88 evidence or offered to its preponderance, one of which is necessary under our decisions to reverse it, but on the contrary we concur with him that there is not a shadow of evidence in the case tainting the transaction with moral fraud and corruption, either, as he stated, in the satisfaction of the mortgage or in the nature of the payments. No one knowing the parties, and having the testimony before him which Judge Pressley had, especially, that the late lamented James L. Petigru, the father of Mrs. Carson, and grandfather of the other two beneficiaries under W. A. Carson's will, not only have full knowledge of the whole transaction, but desired and approved its consummation, could for a moment believe that it was conceived and perpetrated in fraud. It is true that the settlement was based on Confederate treasury notes, which soon thereafter turned to ashes, but at that time there was no other medium of exchange in this Southern country. The fortunes of war had
89 driven every other from our midst. It had become from necessity the currency of the courts, judicial sales, banks and bankers, professional men, merchants, and all classes of business. It was received for labor and all kinds of service, and property of every species, real and personal, constantly changed hands upon it. It paid notes, bonds, and judgments, and was for years the very life-blood of the people in all their business relations.

If simply the use of this money by them is enough to fix fraud upon McBurney, Ball, and Robertson in a legitimate transaction thus completed in open daylight, and in the very presence of the nearest relative of the parties, who, at that time, was the acknowledged head, not only of the bar of South Carolina but of the entire South, and with few equals anywhere and equally as distinguished

for his high personal integrity and abhorrence of fraud, then
90 the people of the Southern States as a whole were steeped in fraud during the war, because everybody, without exception, used it then. We see no error in this finding of the circuit judge upon the evidence before him.

4. Did the circuit judge err in holding that the plaintiff had a valid mortgage on Dean Hall discharged of the Ball mortgage? This part of Judge Pressley's decree is assailed upon three grounds: First, that the Ball bonds and mortgage had been transferred by the executors from themselves as such to themselves, as trustees under Carson's will in 1857, and, therefore, Robertson, one of the executors, had no legal right to receive payment of these bonds or to cancel the mortgage in 1862; second, that Robertson as one of the executors had no right to act alone, even if the bonds and mortgage were still in their possession as legal owners, because, being in that event joint owners, neither could act alone; 3rd, that in no event
91 could the debt of Ball be legally discharged by the executors in such currency without the consent of the *cestui que trusts*. In other words, the appellant contends that the executors were trustees, and that, therefore, they could not even as executors receive payment of the Ball debt in anything but legal currency.

To entitle the first ground to consideration the fact upon which it is based should appear as an established fact in the case, to wit, that the bonds and mortgage of Ball had actually been assigned by the executors to themselves as trustees before the payment by Ball. This was a question of fact, involving at the same time the question of law whether at the time of the alleged transfer it was legally competent for the executors to make such a transfer.

The will directed that the proceeds of the sale of the property should first be applied to the payment of the testator's debts,
92 and then the residue to be divided and held in trust by his executors for his wife and children. Under our law executors and administrators are allowed one year to ascertain the indebtedness of the estate, and the courts will not take judicial cognizance of proceedings instituted for the purpose of making distribution until after the expiration of the estate of the deceased, of one year from his death, said Chancellor Dunkin in Adger, ex'r of Adger, *et al.*, MSS., Charleston Dist., 1859, p. 252.

In this case Carson died on the 17 Aug., 1856. It is claimed that the transfer was made 22 June, 1857. This was within the year, and was premature. But, independant of this legal question, has the fact of the assignment been legally established in such way that Judge Pressley could not have disregarded it as a fact? Judge Pressley does not state his finding upon that question, but we think the testimony was hardly sufficient to establish this fact. The only
93 evidence upon the subject were the returns of the executors, filed in the probate court. There was nothing upon original papers, which were the subject of transfer, showing the assignment. The executors had not been discharged by any official act of the probate judge upon notice given that the duties of trustees had been assumed by them. The papers had been originally executed to

Robertson & Blacklock as executors, and they still appeared upon their face to belong to these parties in the same capacity. Under this state of facts, in our opinion, the testimony was not sufficient to establish the transfer claimed, and on that account the ruling of Judge Pressley is not obnoxious to the objection. But even if the transfer had been regularly made, would it defeat the payment made by Ball is that payment was free from fraud and collusion, and
94 elsewhere legal? This would be a fraud upon Ball. Finding his bonds in the hands of those to whom he had executed them, with no mark of transfer, and nothing whatever to excite suspicion, he was fully justified in acting upon the supposition that they were still the legal owners. He knew no one in the transaction but the executors. They were his creditors. He found his bond & mortgage in the possession of one of them, the other having left the State, and he paid off the debt and cancelled the mortgage. If this payment was otherwise legal no court could disturb it. This was not a case where the debtor was bound to see to the application of the fund at his peril. The executors had full power under the will to sell the estate and receive payment, and it was no business of the purchasers to follow the funds to their directed destination. Laurens *vs.* Lucas, 6 Rich. E., 226.

95 It is not necessary to discuss the second ground above. It is familiar law that executors are not bound to act jointly in receiving payment of debts due them as such, or the estate.

In most respects the act of one is the act of all; either can release or pay a debt. Williams' Ex'rs, p. 949; Earle *v.* Anderson, 9 S. C., 460; Tompkins *v.* Tompkins, MSS. This is not denied by the appellant; in fact it is admitted in the argument, and it has only been referred to herein because in the answer the ground is taken that Robertson alone executed the satisfaction on the mortgage.

This brings us to the consideration of the last ground urged against this last holding of the presiding judge: Could the executors legally receive Confederate currency in payment of the Ball bonds, and therefore execute satisfaction of the mortgage?

This is independent of the question of actual fraud, and
96 raises in point whether it is competent for executors or any other trustees having charge of the estates of others to settle with the debtors of such estates upon any other basis than legal currency—not whether such settlement is a breach of trust on the part of the trust-, but whether the debts can be discharged except upon the payment of legal currency.

Many vexed and anamalous questions have grown out of the use of Confederate currency during the war by the people of the Southern States, and numerous decisions are found in our own reports upon this subject, both before the adoption of the constitution of 1868 and since.

While among these cases several are found where trustees have been held liable (under certain circumstances) for a breach of trust in receiving this currency, not a single case appears where the

debtor to the trustee has been made to repay his debts once
97 paid in such currency in the absence of all fraud and collusion between the parties.

The old court, as organized before reconstruction, as well as the court as organized since, has invariably held that executors and administrators, being the legal owners of estates under their charge, have all the rights of such owners so far as their relations to third parties are concerned, and, while they may be held responsible to their *cestui que trusts* for failing to observe proper care and legal prudence in the discharge of their fiduciary duties, either in the collection or investment of the funds under their control, or otherwise, yet where the transaction is free from fraud the *cestui que trust*, if he feels ag-rieved, must look alone to the trustee for redress. He cannot push the trustee aside and assail his debtor. This seems to have been well settled in this State so far as a series of decis-
98 ions of the court of last resort can settle a principle. Out of the many cases found in the reports in which the subject of Confederate currency and Confederate transactions have been discussed the following are referred to as especially bearing on the question now before the court. McPherson *vs.* Gray, XIV Rich, E, 128; Wiseman & Finley *v.* Hunter (*Ibid.*, 175); Mayer *vs.* Mordecai, 1 S. C., 399; Sanders *v.* Rogers, *Ibid.*, 452; Creighton *v.* Pringle, 3 S. C., 77; Cureton *v.* Watson, 3 S. C., 458; Clark *v.* Patterson, 4 S. C., 290; Singleton *v.* Lownds, 9 S. C., 465; and State *v.* Mosely, 10 S. C., the two former of which were decided by the old court before the constitution of 1868, the others since.

In most of the cases the main question was whether the trustee had committed a breach of trust in receiving Confederate money and thereby discharging their debtors. The question being determined upon the principles applicable to the duties of the special trust, such as good faith, reasonable diligence, a proper observance of the
99 terms of the trust and of the law prescribing the duties of trustees, but in several the precise question under discussion was considered and adjudged, and we think that those of the first class, in which the trustee has been held liable, negatively sustains the discharge of the debtor as fully as the second class does affirmatively, because the only ground upon which the trustee could be held responsible as for a breach of trust is the fact that he has discharged the debtor. If the debtor has not been discharged, then no injury has been done and no breach of trust committed. Thus all of these cases may be regarded as authority for Judge Pressley's holding now under consideration.

In McPherson *v.* Gray, 14 Rich. E., a decree on creditor's bill made in 1859 directed the master to sell testator's estate for one-third cash, and the residue on a credit secured by mortgage; the debts to be paid out of the proceeds, and the residue, subject
100 to the trust of the testator's will, to abide the future order of the court.

The master made the sales, and took from the purchaser of a plantation his bond for a large sum of money, with mortgage. In January and March, 1864, the purchaser paid the bond to the master in

Confederate treasury notes—a currency which at that time had greatly depreciated, but which was the only currency in the country. The court, concluding that the payment was made in good faith, held that neither the purchaser nor the master was liable to the beneficial owners of the bond, Wardlaw, A. J., delivering the opinion of the court.

There is a striking similarity between this case and the case now before the court. In both cases land was sold before the war partly for cash and partly on a credit and a mortgage taken to secure the credit portion of the sale; the proceeds of the sale first to
101 be applied to the debts; the residue to be held subject to the trusts of testator's will. In both the purchaser paid the purchase-money in depreciated currency—Confederate notes; the first being paid in 1864, the latter in 1862. In both there was an entire loss to the *cestui que trust*. In both the payments were made in good faith; in the first the court consisting of Dunkin, Wardlaw, and Grover, the latter sitting in the place. Inglis concurred in holding that neither the purchaser nor the master was liable to the beneficial owners of the bond, and why should not such be the holding in the present case?

There is no difference whatever between the two cases, except that in the present case Robertson was an executor deriving his authority to sell from a will, and, in McPherson and Gray, Gray was the master in equity, deriving his authority to sell from an order of the court. The trusts to be discharged were the same, and both were trustees.

Executors, we suppose, are trustees, and Mr. Justice Ward-
102 law said, in terms, that "Mr. Gay, the master, was a trustee." McPherson *v.* Gray, *supra*, p. 130.

In Wiseman and Finley *v.* Hunter & others, XIV Rich. E. 167, under an order made in June, 1861, to collect a certain bond, dated in Jan'y, 1860, with as little delay as possible, the commissioner, in August, 1862, received payment in Confederate treasury notes. In May, 1863, the commissioner reported that he had collected the bond, and on motion of the solicitor of the parties entitled to the fund an order for distribution was made. Two of the parties resided in Tennessee, and did not receive their shares, and they sought to have the payments opened and to compel the obligor to pay their shares. The court held that the obligor was discharged by the payment and that the transaction could not be opened. This was in 1868, when Dunkin, D. L. Wardlaw, and Inglis composed the court. "Debtors have rights as well as creditors," said the president of the court, Dunkin, in delivering the opinion; and further, where a transaction for — has been consummated and rights vested the repose of society demands that it should not be opened. True, in this case the commissioner had been ordered to collect with as lit-
103 tle delay as possible, and at the instance of the solicitor of the parties, by a subsequent order, distribution had been directed, but there was nothing said in either of these orders about Confederate treasury notes.

In Mayer *vs.* Mordecai, 1 S. C., 383, by deed made in May, 1860,

three bonds secured by mortgages of real estate were assigned to B, in trust, to invest the proceeds as soon as received in such manner as the said B may think proper, on consultation with the *cestui que trust*. The *cestui que trust* removed shortly afterwards from North Carolina, where the trust was created, to New York, and remained there during the war with the Confederate States. In 1862 and 1863 B collected the bonds in Confederate treasury notes, then much depreciated, and invested the proceeds in bonds of the Confederate States, without consultation with the *cestui que trust:* Held, That B committed a breach of trust in receiving payment of the bonds in Confederate treasury notes and in investing the proceeds in bonds of the Confederate States, and that he was liable to account to the *cestui que trust* for the sums received. Held, further, That the obligors on the bonds were not liable to account to the *cestui que trust*, for they were discharged by their payments to B.

104 Here, unlike the cases above, the trustee was held liable on the ground that he had acted without consultation with the *cestui que trust*, which the deed expressly required; but the obligors, as in the other cases, *was* protected. This case was heard in 1869, when Moses, Willard, and Hoge composed the court. Chief Justice Moses delivered the opinion, saying: "That although the trustee is not discharged from liability to account for the three bonds, yet the mortgage, as against the original debtors, cannot be set up as of force. The legal title to the bonds was in him, and with the investment of the proceeds they had no concern, and none." If, according to the ruling in this State, a vendee is not bound to see to the application of the purchase-money (Laurens *vs.* Lucas, 1 Rich. E., 226; Lossing [*vs.*] Peyton, 2 Des., 375) or a mortgage under the order of the court, that the money is appropriated to the purpose for which the mortgage was taken (Spencer *v.* Bank of State, — Ball. E., 460),

105 much less can a debtor who makes satisfaction to the creditor in a manner acceptable and agreed to by him in the form of actual payment be held to such requisition."

Quoting what Mr. Justice Inglis said in the case of Antin *vs.* Kinsman, 13 Rich. Eq., 265, to wit: "That a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases and by voluntary acceptance of such substitute as payment makes it so."

Mayer *v.* Mordecai, *supra*, p. 398.

In Lamens *v.* Rogers, 1 S. C., 452, the trustee was held liable for collecting in 1863 well secured bonds and parties to invest as the instrument creating the trusts directed, but there was no intimation that the payment by the obligor was invalid, or that the bonds had not been extinguished thereby. The case of Creighton *v.* Pringle, 3 S. C., 77, is to the same effect.

In Clark *v.* Patterson, 4 S. C., 290, it was held that the com-

106 missioner in equity was not liable, and in the State *v.* Mosely, 10 S. C., 6, that the sheriff was exempt from responsibility in receiving Confederate in satisfaction of an execution in his office. These cases, and many others might be cited, establish the principle

that executors and administrators and quasi trustees, such as commissioners, master-, and sheriffs, had authority during the war to receive the only currency which was then in existence in satisfaction of bonds, notes, and mortgages under their control, when the payment was made by the debtors, free from fraud and collusion. Clearly that the payment was not *ipso facto* void, on the ground that the trustee could receive payment only in legal currency, this principle discharges the debtor in all such cases. But whether the trustee shall be exempt from responsibility is another question, which will depend in each case on its *on* special facts, such
107 as good faith, reasonable and proper dilligence and care, and the terms of the trust under which he acts.

In view of these authorities coming from the court of last resort in this State, it is needless to inquire elsewhere. In any event these must control us, running as they do in the same direction in an unbroken current on the exact point involved here from the close of the war, when these perplexing questions first arose up to the present time.

The case of McDuffie and McIntyre, 10 S. C., 551, is not in conflict. That case decided that a guardian had no power to sell a bond and mortgage belonging to the estate of the ward. That such property occupied the same position that any other property of the ward would *would*, such as a house, a watch, goods, and chattels of every kind or real estate. Of such property belonging to the
108 estate of his ward the question has no such legal title as would authorize him to dispose of it without the order of the court. But there is a clear distinction between such a case and that of an executor or administrator who is authorized to sell the property of the estate and take notes therefor to themselves.

The cases from the Supreme Court of the United States relied on by appellant had other features different from the above cases, which prevent conflict. In Fretz *vs.* Glover, 22 Wallace, 198, the bonds in no sense belonged to the party who collected them; he was simply an att'y in possession for collection, and the case turned upon the question, whether he had exceeded his powers in the manner of the collection. Not being the legal mover, he had no right to exceed his agency, and the Court held the parties who paid him in other currency than such as his agency authorized him
109 to receive responsible over to the principle who repudiated the authorized settlement. This principle does not touch the one here. Here the executor was the legal owner; had full power at his peril to deal with the bonds in question as he chose; to exchange, release, or compromise, which being done without fraud and free from imposition, surprise, or undue advantage would be final, and could not be opened to the prejudice of the bebtor.

In Howe *v.* Luckhart, 17 Wall., 571, an executor in the State of Alabama was held responsible for funds of the estate invested by him in bonds of the Confederate Government. This was upon the ground that, inasmuch as these bonds were issued for the avowed purpose of raising funds to prosecute the war, the investment was an act giving aid and comfort to the enemies of the United States,

and therefore void. The question of liability of the debtors
110 to the estate who had paid off their indebtedness was not involved and not passed upon.

We see nothing in Williams and Baffy, 96 U. S., 177, or Ketchum and Buckley, 99 U. S., 188, which touches the question raised here. It is said in Williams and Baffy, by Mr. Justice Fields, "that debts can only be satisfied when paid to creditors to whom they are due or to others by direction of lawful authority." * * * This is not controverted—on the contrary, is recognized as familiar law; but it is equally good and familiar law that when creditors to whom a debt is due extinguish the debt by the receipt of that which they have consented to receive as payment, whether it be money or any other commodity; there is no authority in the courts or any other power to revitalize it. It becomes an executed contract and passes out of existence. We think that Robertson occupied
111 the position of a creditor. Ball was his debtor, and Ball having paid to Robertson the amount due him in such currency as Robertson was willing to receive, the payment being *bona fide* and free from fraud and collusion; the matter then reached a finality beyond resu-citation by this court or any other legal authority.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Concur:

McIVER, *A. J.*, AND
McGOWAN, *A. J.*

Filed Oct. 28, 1882.

112 [Endorsed:] Supreme Court, April term, 1882. Mary A. Hyatt, ex'x, *vs.* William McBurney. Opinion. Simpson, C. J. Certified copy.

113–221 (Here follows transcript of record on appeal to the Supreme Court of the United States from the C. C. U. S. for the district of South Carolina in the case of McBurney & McGhan, app'ts, *vs.* Carson, which is omitted in printing by stipulation of counsel & order of court.)

222 Know all men by these presents that we, Clarence A. Seward and Charles M. Da Costa, both of the city, county, and State of New York, are held and firmly bound unto Mary E. Hyatt, widow and heir-at-law of Edmund Hyatt, deceased; Mary A. Hyatt, as executrix and devisee and heir-at-law of the said Edmund Hyatt, deceased; Joaquin Delmonte, executor of the said Edmund Hyatt, deceased, and Julia Delmonte as devisee and heir-at-law of the said Edmund Hyatt, deceased, in the full and just sum of one thousand dollars, to be paid to the said Mary E. Hyatt, Mary A. Hyatt, Joaquin Delmonte, Julia Delmonte, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our

seals and dated this eighteenth day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately at a term of the supreme court of the State of Carolina in a suit depending in said court between the said Mary E. Hyatt, Mary A. Hyatt, Joaquin Delmonte, Julia Delmonte, complainants, and William McBurney, William Hasselton, Alfred L. Gillespie, and Thomas R. McGahan, members of the late firm of Hyatt, McBurney and Company, and Caroline Carson, as defendants, a decree was rendered against the said Caroline Carson, and the said Caroline Carson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to recover the said decree in the aforesaid suit, and a citation directed to the said Mary E. Hyatt, Mary A. Hyatt, Joaquin Delmonte, [and] Julia
223 Delmonte, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that, if the said Caroline Carson shall prosecute her writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) C. A. SEWARD, [SEAL.]
(Signed) CHAS. M. DE COSTA, [SEAL.]

Sealed and delivered in presence of—
(Signed) GEO. F. HAYWOOD.

[Seal of U. S. Supreme Court.]

Approved by—
(Signed) M. R. WAITE,
Chief Justice U. S.

Nov. 21, 1882.

I, Joseph M. Deuel, clerk of the circuit court of the United States for the southern district of New York, do hereby certify that the within-named obligees are known to me to be perfectly good and responsible for the penalty named in the foregoing bond, namely, one thousand dollars.

N. Y., Nov. 18th, 1882.
(Signed) J. M. DEUEL, *Clerk.*

224 Supreme court of South Carolina.

CLERK'S OFFICE, COLUMBIA, S. C.

Filed November 24th, 1882.
(Signed) ALBERT M. BOOZEE, *Clerk.*

A true copy.
Attest: ALBERT M. BOOZEE,
Clerk of Supreme Court of South Carolina.

[Seal of Supreme Court of South Carolina.]